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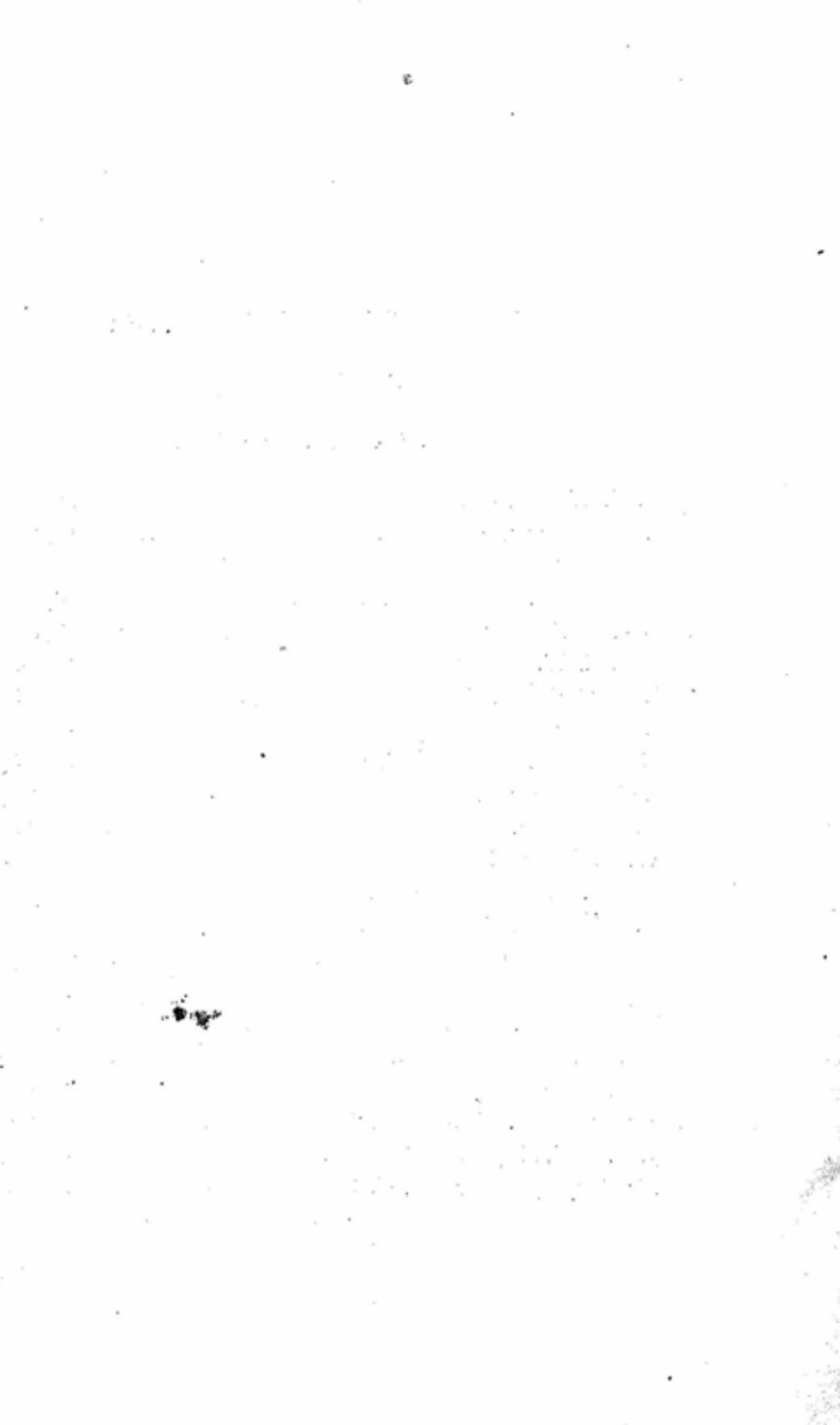


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PREFACE.

Following upon the publication of my Annotated Civil Code of Japan and my Commentary on the Commercial Code of Japan, I have received numerous enquiries from various correspondents in Europe and America regarding the Japanese system of law in general; and it has been suggested to me, by certain valued friends, that a treatise on the subject would be welcomed and appreciated by Occidental students of Comparative Jurisprudence.

The World is cognizant of the fact that Japan has adopted laws based upon the principles of European jurisprudence, but it is not by any means equally well known in foreign countries exactly to what extent those principles have been applied, and the Japanese law, as an organic whole, is still a more or less sealed book to the majority of Western jurists.

The object of this book, which is compiled on the Encyclopædic Method, is to furnish European and American readers with an outline description of the system of law regulative in Japan, and an explanation of the fundamental legal principles which are accepted by Japanese jurists and which permeate the judgments of the Imperial Courts.

While I have to acknowledge my indebtedness to many learned European and Japanese authors, I express my particular obligations to Mr. Nakamura Shingo LL.B for permission to make free use of the materials contained in his excellent *Hōgaku Tsūron*.

I desire to thank the gentlemen composing the Council of the Asiatic Society of Japan for generously undertaking the

publication of the book when they might well have hesitated to do so in view of general financial stringency caused by the European war.

I also wish to thank my very efficient secretary, Mr. Nagahara Eiichi, for extremely valuable assistance rendered by him in the preparation of the book, the compilation of the index, and the arduous work of proof-reading.

Believing that the work will tend to remove international misunderstandings (which chiefly arise through imperfect knowledge), I respectfully submit it to the indulgence of the public, and if peradventure it be found useful by those who consult its pages, I shall feel amply repaid for the time and labour bestowed upon its production.

I can hardly hope to have avoided all mistakes and errors, and I shall be grateful to readers who may be good enough to draw my attention to any slips or oversights with a view to their correction in future editions.

J. E. DE BECKER.

Yui-ga-hama,

Kamakura,

Japan,

7th December, 1916.

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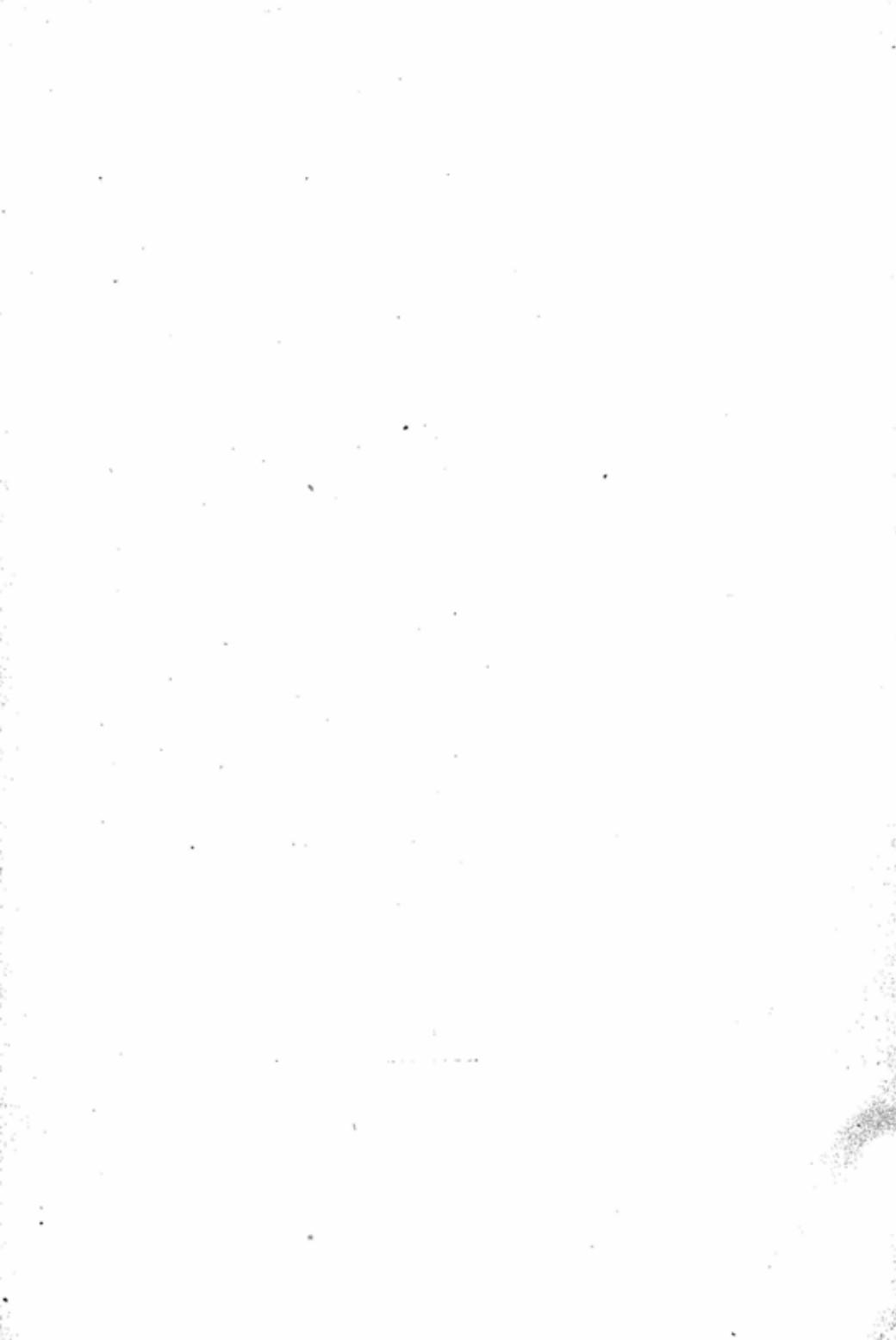
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BOOK I

GENERAL DISCUSSION ON JAPANESE JURISPRUDENCE

CHAPTER 1.

HISTORICAL SKETCH.

The legal history of Japan may be roughly divided into three periods, namely :—

(1) *The First Period*—from the foundation of the country to the 7th century—during which the national patriarchal system obtained. During this period, services in the nature of ancestor-worship constituted the most important function of the Government ; and official positions, both central and local, were hereditarily occupied by various leading families, even military service being performed by certain powerful houses supported by their own followers. Trades and crafts of various kinds were also hereditary in certain families. The authority of the heads of families was very great indeed ; in fact, they were, like the household fathers in ancient Rome, absolute autocrats within their family circles and enjoyed the *jus vitae necisque*. The private ownership of land had not only commenced, but the abuse of monopoly of land was already not inconsiderable.

(2) *The Second Period*, embracing the interval between the 7th century and the Restoration in 1868. Chinese civilization had been gradually gaining ground in Japan. In the 7th century, the Chinese legal system—that is, the system under the Soei (590-618) and T'ang (618-907) dynasties, which mark the

most brilliant period in the history of Chinese law, was adopted on a most extensive scale. An office charged with the superintendence of national worship (*Shingi-kwan*) was established apart from, but on an equal footing with, the *Dajō-kwan* (Great Council of State), the latter being the highest organ of the government, subject to which were various departments nearly answering respectively to the various branches of the administration at present. The whole country was divided up into provinces, districts and villages with their respective heads, while the common people were classed into groups of five houses each, the members of each group being required to assist and watch each other and assume the obligation of a kind of mutual joint liability for good behaviour *vis-à-vis* the State. The system of hereditary occupation of offices—as also the practice of the hereditary pursuit of trades and crafts—was abolished, so that all persons became eligible for public office irrespective of their birth and rank, such eligibility being based on education and merit, and everybody became free to practise any trade, craft or profession they liked. A general conscription system was adopted and one-third of all able-bodied males, except officials, were required to enlist at the age of twenty. In order to remedy the abuse of the monopolization of land, the whole of the arable land of the country was nationalized, and it was distributed among the people at an equal rate, the land held by each person reverting to the State on his death, and neither sale nor succession being allowed, though the holder might let it for a term not exceeding one year. A land tax and a sort of poll-tax were levied. Schools were established in various parts of the country, and their graduates were appointed to public offices upon successfully passing competitive examinations. Elaborate criminal laws and civil laws (including a body of minute family law) were also enacted.

The adoption of the Chinese system gave a great impetus to the progress of civilization in Japan; and the science of law attained a high degree of development. The system was, how-

ever, not in harmony with the existing conditions of the country in many points, and it consequently gradually fell into disuse as time went on. Japan having been an essentially agricultural country from time immemorial, the desire of the people for private ownership of land was so strong that it was found hard to maintain the system of national ownership. Birth and lineage, also, were held in such high consideration and esteem that it was no easy matter to appoint persons to public offices purely in consideration of their inherent merit. The result was that public offices soon became the exclusive property of a few powerful families, and land passed, to a great extent, into the hands of influential houses and ecclesiastical bodies. Owing to the decline of the military system, the Government was obliged to call in the services of the military clans from time to time; and at length political power fell into the hands of one successful warlike family after another, and a feudal system was inaugurated.

The decline of the authority of the central government resulted in the division of the country among various local chieftains who lived in a perpetual state of war with each other. One after another of these chieftains who succeeded in subduing the rest established a separate government, called the "*Bakufu*" (meaning "headquarters") and part of the country was divided among his vassals who had rendered services to him in his work of pacification, while part was allowed to be retained by those influential houses which gracefully submitted to his authority. These local lords or "*daimyō*" were subject to the strict control of the Government; but within their own domains they were absolute autocrats. The family which succeeded in organizing this system in its most complete form was that of the Tokugawas, who continued in power from 1603 to 1868—during a period of 265 years. The legal system of the successive military governments was founded on custom: their written laws were intended to serve practical purposes and made but little pretence to elaborateness of form. But throughout this period, the Chinese in-

fluence continued to make itself felt, though subject to modifications rendered necessary by the conditions of the country. The written laws of the Tokugawas were mostly kept secret, such laws being known only to those who were immediately concerned in their actual administration. Of such laws, the most important were those which regulated the relations between the *de facto* Government in Tōkyō (called Edo in those days) and the Imperial Court in Kyōto (which continued in existence uninterrupted, though it enjoyed but little real power) and the relations between the Government and the provincial lords, and the criminal law, the latter being followed by the provincial lords and a similar system being enforced in their respective domains.

All real power vested in the "Bakufu," although some shadow of authority was reserved to the Imperial Court, the expenditures of which, together with the salaries of the Court functionaries, were paid by the "Bakufu". The "Bakufu" thus attended to diplomatic and military affairs and matters relating to minting, gold, silver and copper mining, temples and shrines, important suits, etc., while the capital itself and all points of vantage throughout the country were placed under its direct control, being governed by agents or governors ("daikwan") of its own appointment. The other part of the country was parcelled out among about two hundred and seventy provincial lords, and these were left to act pretty much as they chose within their respective domains, which were, therefore, practically so many independent petty states. The Government retained the wives and children of these provincial lords in Edo by way of hostage, and they were themselves required to attend at the seat of Government for a certain period of time each year. In the event of any provincial lord being guilty of a serious fault, his fief was reduced, exchanged for another, or entirely forfeited. In time of war, they were required to furnish men and arms, while in time of peace, a fixed tax was levied for military purposes; and when the Government carried out important works

(such as the construction of the Nikkō Temples), they were expected to make adequate contributions towards the expenses. Further, in case of need, anything and everything could be required of them without the central government being hampered by any legal restrictions whatsoever. The other notable features of the Tokugawa law were (1) that foreign intercourse was considerably restricted by the Government in order to safeguard its own existence and permanent tenure of power, and Christianity was forbidden to the same end, and (2) that the nation was classified into warriors ("bushi") and commoners ("heimin"), etc. The warriors were granted hereditary allowances and were forbidden to carry on business for profit, while commoners were disqualified from entering the civil or military services but were required to pursue productive industry. The sale of land was also forbidden with a view to prevent it being monopolized by a few persons. On the other hand, a large number of businesses were constituted monopolies in favour of certain families and to the restriction of free competition. Arrangements were also made in order to cause neighbours and relatives to help and assist each other in case of need.

The natural result of the long and peaceful tenure of power by the Tokugawa family was that the whole system became rotten, and its weakness was glaringly exposed when the Government showed itself utterly inadequate to meet the difficulties involved in the foreign intercourse which was forced upon the country by various European powers in the fifties of the last century. The national confidence in the Tokugawa authorities being shaken, the disaffected and ambitious clans rose against them in the name of the Emperor (whose cause had been gradually gaining ground), with the well-known result that Tokugawa Keiki, the last of the Tokugawa rulers, found himself constrained to resign his power in favour of the Imperial Court in 1868. A new *régime* was now inaugurated; and with it we enter the third and last period of the legal history of Japan.

(3) *The Third Period.* The legal institutions of this period are mostly based on those of Europe and America, just in the same manner as those of the Second Period were chiefly based on Chinese models. But at the beginning of the period, the restoration to the old *régime* (as founded on the Chinese system) was strongly advocated, as was but natural, and the organization of the central administration and the criminal law were, among other things, almost a complete revival of the Chinese system which had been introduced at the beginning of the Second Period which we have discussed above, the only modification introduced into the older system of central government being the adoption of public opinion in the matter of legislation—a new idea borrowed from the West.

In 1871, the provincial lords lost their power, and the country was again divided into districts and prefectures governed by officials directly appointed by the new central government. Improvement after improvement was introduced after the example of Western countries, in respect to the military system, finance, communication, education, banking, justice, and so on. The distribution of social castes under feudalism was abolished, and with it were swept away various regulations by which special privileges had been conferred upon certain classes of the people. In 1873, the first Budget was promulgated. In 1875, the Senate (*Genrō-in*) and the Supreme Court (*Daishin-in*) were organized and a change was made both in legislation and in the administration of justice. Prefectural assemblies and town and village assemblies were constituted in 1878. In 1880, the Board of Audit was established, and a Criminal Code and Code of Criminal Procedure were promulgated. In October, 1881, public notice was given that a Diet would be opened in 1890. In 1889, the Constitution and the Law of the Houses were promulgated, to be enforced as from the opening of the Diet in November of the following year (1890). About the

time of the promulgation of the Constitution, numerous important laws—such as "Regulations for the Organization of the Central Government," "Regulations for the Organization of Cities, Towns and Villages," "Law concerning Administrative Litigation," the Civil Code, the Commercial Code, the Code of Civil Procedure, the Code of Criminal Procedure, etc.—were promulgated, and thus the whole system of justice and administration was placed on a theoretically sound footing. The Civil Code and Commercial Code promulgated in 1890, however, were never enforced, it being the opinion of a majority in the Diet that they required drastic amendment, and the new Civil Code was not enforced until the 16th July, 1898. As to the Commercial Code, this also was never enforced in the form in which it was promulgated in 1890, with the exception of the part relating to Companies, Bills and Bankruptcy, which was enforced as from the 1st July, 1893 (subject to some modifications), while the whole was radically amended (except the part relating to bankruptcy), by a law of more extensive scope promulgated in May 1899, and enforced as from the 16th June 1899. The whole Commercial Code was further amended in 1911, also with the exception of the part relating to bankruptcy. The Penal Code was also amended in 1907. The Code of Civil Procedure and the Code of Criminal Procedure date from 1889. While it is generally recognized that they, as well as the part of the Commercial Code relating to bankruptcy, stand in urgent need of radical remodelling, and while the Government has, of late years, been repeatedly reported to be on the point of introducing bills to that end in the Diet, nothing concrete has as yet been done. In this connection, it is interesting to note that in Viscount Kiyoura's valuable book published in 1899—on which this historical sketch is mainly based—it is stated, in connection with the amendment of various laws promulgated in and about 1890, that "it is hoped that the Codes of Civil and Criminal Procedure also will be amended before

long." That was eighteen years ago, and we are all still "hoping."

As an illustration of the manner in which various laws have been compiled in the present period, we may consider at some length the stages through which the Civil Code has come to assume its present form. But before giving the history of the codification of the Civil Code, it is necessary to say a few words as to the progress of jurisprudence in this country subsequent to the Meiji Restoration. Previous to that time, jurisprudence in Japan had been confined to the study of native law and Chinese law under the Tang, Ming, and Ching dynasties, and there had been no other field open to legal students. When the country was opened to foreign intercourse, and Occidental science began to flow eastward, French law found its way into Japan ahead of all others, the French Code Napoleon, translated by the Institution Investigation Committee in the beginning of Meiji, being the first European code that was translated into Japanese. When the Law School was first established in 1872 as an appendage to the Department of Justice, law was taught in the French language, and it was the French law that was studied by most law students at that time. Subsequently, however, German jurisprudence also gradually came into vogue and this is now in great favour in Japan, German authorities often being glibly quoted by lawyers even in Court, and swallowed down as the last word on the subject. On the other hand, in the Law College of the Imperial University (established in 1877) English law was taught from the very beginning, and many graduates were turned out from that College and gradually made their influence felt in the profession. In fact, the English law chair had been the only foreign law chair there until about 1885, when other chairs were created for the teaching of French and German law also.

At the Restoration, while the Government made sweeping changes in the administrative system, it at the same time set about the codification of various codes and diligently pushed on

the work. The reasons which induced the authorities to prosecute the task with so much eagerness were (1) that custom in the Tokugawa *régime* varied from place to place, it being far too tedious and elaborate in some places while it was too simple and vague in others, so that it was deemed necessary that an accurate and systematic written law should be compiled, taking advantage of the rich collection of legislative precedents offered by various Occidental countries, and duly considering the customs prevailing in the country ; and (2) that the treaties then in existence were deemed so derogatory to the dignity and interests of the nation that it was considered essential that they should be speedily re-modelled, and for this purpose it was a matter of urgent need that good codes should first be compiled, so that aliens might rely on the protection of Japanese law with a reasonable sense of security.

In 1874, the Institution Investigation Committee (*Seido Torishirabe-Kyoku*) was established in the *Dajōkwan*, and the French Civil Code was translated into Japanese as its initial work. In the summer of 1875, a Committee for the Codification of the Civil Code was appointed, and a draft was finished in April 1878. This was an imitation of the French Code both in arrangement and in substance—in short, it was practically neither more nor less than a translation of the French Code. Not satisfied with this, and being desirous to compile a more nearly perfect code embodying the best legislative precedents and theories obtaining in Occidental countries, the Government commissioned Monsieur Boissonade de Fontarabie, the famous French jurist, to draw up a new draft. This was in 1879.

In April, 1880, the Civil Code Codification Bureau was newly organized and a committee was appointed to deliberate upon M. Boissonade's draft ; but it was not until 1886 that the Book of Property and the Book of Acquisition of Property were gone through. In the same year, the Bureau was abolished, and a Law Investigation Committee was appointed instead with a view speedily to complete the codification of the codes required

for the purpose of facilitating the then contemplated revision of Treaties with foreign Powers, but without any result. In the following year (1887), jurists versed in foreign law and its administration were appointed on a reporting committee for the examination and explanation of the draft, and article after article was discussed in the general meeting of the Investigation Committee, with the result that various parts of the Code were successively promulgated in the course of 1889, and it was proclaimed that they would be enforced as from the 1st January 1893. This Code, however, was never put into force, as we have already seen. It was found defective both in principle and in practice, and it was also argued that it was repugnant to the manners and customs of the Japanese people. With the approval of the Diet, therefore, it was proclaimed, in November 1893, that its enforcement should be deferred until the end of 1896, so that it might be completely amended. In 1893, a Code Investigation Committee was appointed, the result being that various portions were successively promulgated in 1896 and 1898 with the approval of the Diet, the whole being enforced as from the 16th July, 1898. This is the Civil Code actually in force.

The compilers of the new Civil Code aimed at simplifying the old Code of 1890 both in respect to arrangement and terminology, and instead of exclusively adhering to the French law—as in the case of the old Code—, they drew largely upon the laws of Germany, France, Belgium, Holland, Switzerland, Great Britain, the United States, etc. They also paid due consideration to native custom and usage. Such was especially the case with the part relating to relatives and succession, for the Code emphasized the relations between the head and the members of a house, and while, in the old Code, succession was only regarded as one of the causes of acquisition of property, succession in the new Code—that is, succession proper—is primarily succession to the headship of a house, to which the succession to the property (left by the former head of the house) is merely incidental.

CHAPTER 2.

ETYMOLOGY OF THE TERM "*HŪRITSU*" (LAW).

The Japanese term *hōritsu* by which the English word "law" is usually rendered is a compound of the two words *hō* (法) and *ritsu* (律). The word *hō* is also pronounced *noritoru*, meaning "what is to be acted on as rules"—that is, the standard of action. A Chinese dictionary called "*Shakumei*" (釋名) explains that the word *hō* means *to compel*, that is, to cause persons not to even think of acting against its spirit: to compel persons to do what is right and impose limits which they are forbidden to transgress. The same book also states that the word "*ritsu*" (律) means *to restrain*, that is, to restrain and curb the mind of man and not to allow it to act capriciously. Both words thus mean something which hinders persons from acting just as they please. Another Chinese book, "*Jīga*" (爾雅), says that the word "*hō*" means *regularity*; and that the word *ritsu* means *law* or *regularity*. This also shows that both words are alike intended to mean that which prevents persons from doing acts which are opposed to what is regular and normal.

Though in Japan there was what is popularly known as the "*Constitution*" (*Kempō*) of *Shōtoku Taishi*,* this was more a set of moral injunctions rather than a code of law. There were other laws such as the *Taihō Ritsu-Ryō* (大寶律令) (a system of law compiled after the Chinese fashion in the 1st year of the *Taihō* [701-704]), the *Yōrō Ritsu-Ryō* (養老律令) (which is the name given to the *Taihō Ritsu-Ryō* as amended in the 2nd year of *Yōrō* [717-24])), but the word "*hō*" was never employed

* *Shōtoku Taishi* (572-621), who was the second son of the Emperor *Yōmei* (586-587) and Regent under the Empress *Suiko* (593-628), is famous for his devotion to Buddhism (for the propagation of which religion he founded many monasteries) and for his *Kempō*. It was *Shōtoku Taishi* who sent the first embassy to China (607), and adopted the Chinese calendar (604). By the way, the word "*hō*" is pronounced *pō* in a compound for the sake of euphony.

to designate them. The word "*ritsu*" is also prononnced *totonoeru*—"to regulate," that is, to set right what is inharmonious or discordant in things. Whatever the original meaning of the word may have been, however, it was, as a matter of fact, employed only in the sense of *penal law* both in China and in Japan, though such is not the case at the present day.

It is not known when the word "*hōritsu*" (law) was coined for the first time in Japan; but the *Imperial Constitution* expressly employs the word and defines its meaning. In the ages of *Taihō* (701-04) and *Yōrō* (717-24), there were only *ritsu* and *ryō*; *ritsu* meaning, as a rule, prohibitory or penal law, and *ryō* imperative or civil law. In the times of the *Hōjōs* (1205-1333), they issued the "*Goseibai Shikimoku*" (御成敗式目) (a set of rules which are also known as the "*Jōei Shikimoku*" (貞永式目) because they were promulgated in the 1st year of *Jōei* [1232-33]). It is surmised that they purposely adopted this new name for their law and refrained from styling it "*ryō*" or "*ritsu*," because that would have been tantamount to setting at naught the substantive laws promulgated by the Imperial Court. Under the *Ashikaga* rule (1388-1565), there was also the "*Kemmu Shikimoku*" (建武式目) (so called because it was formulated in the 3rd year of *Kemmu* [1334-38]). During those ages, when the country was divided among warring provincial lords subsequent to the downfall of the *Ashikagas*, law went by different names in different provinces. Under the *Toyotomis* (1582-1600), it was called "*Go-jō*" or "*Hekisho*" (because posted up on a wall). Under the *Tokugawa* régime (1603-1868), it was called "*Halto*," "*Osadame-gaki*," "*Osadame-gaki Hyakkajō*" (*lit.* The law of one hundred articles), "*Fure*," and many other names.

Subsequent to the *Meiji Restoration* (1868), Japan had the "*Shinritsu Kōryō* 新律綱領," "*Kaitei Ritsurei* 改定律令" and numerous other important laws, but none of them were termed "*hōritsu*." They have been called simply "*hō*," "*jōrei*," "*rei*," "*fukoku*," "*tasshi*," "*kisoku*," etc. It will thus be seen

that the word "*hōritsu*" is simply a generic term for "law." As a generic term, too, the word admits of two interpretations—one wide and the other narrow. In the narrower acceptation of the word, "*hōritsu*" denotes a law within the meaning of the *Imperial Constitution*—that is, a law which has been passed by the Diet and sanctioned by the Emperor.

CHAPTER 3.

ORIGIN AND PURPOSE OF LAW.

With regard to the question as to how and why law came into existence, the only possible answer is that necessity—the Mother of Invention—gave birth to the system and has perpetuated it from before the dawn of history to our own times, and will assuredly continue to perpetuate and mould it until the crack of doom. Law has come into existence simply and solely because experience has taught humanity that it is necessary for the maintenance of order among communities of men. Immediately two or more persons meet together, they are pretty sure to have conflicts of will followed by conflicts of action. When each member of the community makes it his business to thrust aside his fellows in his eagerness to enforce his will and achieve his own particular object regardless of the interests of others, it is obvious that society must be exposed to perpetual warfare, and it is impossible to hope for a state of peace and security under such circumstances. In order, therefore, to prevent such conflict, and to promote harmonious intercourse between man and man, law has necessarily come into existence. Thus, where there is a "house," there is a house law; where there is a "tribe," there is a tribal law; where there is a school, there is a law by which such school is regulated. In the same way, a corporation, a village, a town, a city, a district, a prefecture or a state must each have a law of its own, because such bodies could not exist in an orderly manner unless there were

laws governing their organization and function. In short, law has come into existence, after the organization of men into a society, for the purpose of maintaining and guarding the welfare of all alike. This was emphatically stated by Kiyowara Natsuno, the official commentator of the "*Taihō Ryō*" (see above), when he said, in his memorial to the Throne upon the completion of the work:—"Law originated simultaneously with the heavens and the earth."*

The direct object of law is to prevent conflicts of individual wills, and consequently conflicts of actions among the constituent members of a body; and it is by restraining the liberty of persons to a certain extent that this object is partially attained. To restrict the liberty of one person is equivalent to protecting that of others. In punishing, for example, a person who commits an assault, the liberty of the offender is restricted in order to protect the liberty of the other members of society; and when protection is afforded to a great many persons at the cost of a moderate restraint imposed on a few, it may be considered that the order of society is protected and preserved in a legitimate and satisfactory manner.

Kant, in his *Rechtslehre*, has explained the object of law as consisting in harmonizing the will of each person with the wills of others; Bentham holds that law aims at ensuring the greatest happiness to the greatest number; while Hanfei, a Chinese philosopher, says that the peace and strength of a state depends on law. Though explained in different words, these three all agree in considering law as a means of maintaining order.

In the Roman, German, and French languages, "justice," "law" and "right" are all expressed by the same word. Blackstone has also said that the object of law consists in commanding men to do what is right and prohibiting them from doing what

* There is a familiar ring about these words which remind one of certain passages in Hooker's "Ecclesiastical Polity," and of Blackstone's description of the law of Nature.

is wrong. All this may be taken as an illustration of the fact (1) that law is derived from an innate sense of justice, (2) that it commands men to do what is right, and (3) that to do what is right (according to law) is one's right.

CHAPTER 4.

CONCEPTION OF LAW.

Law is that body of rules by which the actions of a given community of men and of the component members of such community are restrained. Thus, the law of a state restricts the actions of such state and those of the nation, and even of foreigners resident within its territory. In some countries, law is derived from the will of the sovereign. Though generally agreeing in deriving law from the will of the sovereign, yet in some countries it is believed to be derived *exclusively* from the will of the sovereign—that is, it is considered to come into existence simply by an expression of intention on the part of the sovereign; while in other countries it is considered necessary to obtain the consent of Parliament. In others, again, it is held to be derived from the aggregate will of the whole nation. So various are the methods by which law is made, and so different is its substance, that there can be no greater mistake committed than to draw generalizations from a state of things obtaining in a particular place or in a particular age. It is entirely erroneous to conclude that there are common principles underlying the laws of all times and all countries, that it is fundamentally necessary for a law to be permeated with such principles, and that no law is law which does not act on such principles. Formed as it is to meet the requirements of a given age and place, law is bound to differ from age to age and from place to place. In one respect only are all laws the same: they always have for their object (at least theoretically!) the purpose of guarding the

existence of the communities for the benefit of which they are respectively enacted.

"Rules" in this connection mean restrictions imposed upon actions providing that a certain cause shall invariably produce a certain result: merely and simply to restrain individual wills does not come within the proper province of law.

CHAPTER 5.

MAINTENANCE OF LAW.

Even where law has come into existence, it will cease to have any value as such when it has no power by which it can assert itself. It is, therefore, necessary that there should be something to support the law, so that it may work satisfactorily and remain in force and effect long enough to accomplish the object with which it has been made. In former days, the maintenance of law was left to the "self-help" of each individual—that is, each person was left to use his own resources for the protection of his lawful rights. For this reason duels and the vendetta were recognized. Among the Teutonic tribes, plaintiff and defendant were caused to walk on fire or were plunged into water; and the party who escaped unhurt, or who was under water longest, was considered as the party in the right; while in England a person who sustained civil damage at the hands of another was entitled to plunder the cattle of the offender, without resorting to the public force of the state. Notable traces of this self-help are to be seen, even now, in criminal law, in the recognition of justifiable defence on the part of the injured party, and, in civil law, in the exercise of certain rights of pledge without the intervention of the public force of the state.

At present, most people believe that the maintenance of law is left to an external force—that is, law is maintained by the *forcible* compulsion of the power of the state; but it may be doubted

whether the compulsion of the power of the state is the only force by which law is maintained. It is probable that by far the greater number of persons endeavour not to contravene the law for reasons other than fear of penalties or of execution by bailiffs—that is, from a rooted conviction that it is right, expedient and advantageous to conform to legal provisions. There must be more persons who refrain from stealing because it is ethically wrong to steal than because stealing entails penal servitude. This conviction is what we may term an *inward* compulsion—that is, the compulsion of conscience. This inward compulsion is also derived from the sense of common advantage in individuals, to which we have already referred. To steal, to omit to return things borrowed, to buy things and omit to pay for them, to sell things and omit to deliver them—all these are causes of conflicts of interest. The sense of advantage accruing from theft must be lessened, or wholly extinguished, by the sense of inconvenience which would be felt by ourselves were we the victim of theft. A man is naturally induced to forego the advantage of not returning money borrowed from another, when he pictures to himself the inconvenience which he himself would feel should another fail to repay loans granted by him. In this way, a sense of common advantage is developed in man, and the development of this sense fosters and accentuates the said inward necessity or compulsion. Men are driven to obey and act in conformity with the law more by this sense of inward compulsion than by forcible compulsion. It is, of course, impossible absolutely to deny that law is maintained by forcible compulsion; but it is a gross mistake to think that law is made what it is by no power other than forcible compulsion. If forcible compulsion was the sole means of maintaining law, the greater the force with which it was supported the better would it work, but, as a matter of fact, such is not the case: on the contrary, experience shows that the harsher the law is, the less satisfactorily it operates. This is well expressed in the "*Spring and Autumn*," a Confucian classic, in these words: "When ordinances are harsh, they are

not obeyed : when prohibitions are many, they do not operate." In the "Book of History," another Confucian classic, we read : "*Punishment is medicine for curing the country : moral teaching is food for promoting peace. To remove evil by moral teaching is to control sickness with food : to ensure peace by punishment is to heal with medicine.*" These are remarks which show that morality and law may mutually co-operate hand in hand.

The "inward compulsion" just referred to is satisfied when (1) each person conducts himself aright and (2) he can place confidence in others. Sincerity and confidence are thus the pillars of society; and confidence and sincerity can be more fully developed by the successful maintenance of law. In short, inward compulsion is the cause, and also the result, of external compulsion, and they mutually assist and aid each other in maintaining law.

CHAPTER 6.

USE OF LAW.

Law is not omnipotent. It is impossible for law to exterminate all evil-doers, nor can it anticipate all breaches of civil obligations. It is unwise to place such exaggerated confidence in law as to believe that the country can be governed by law alone. Even though murder is forbidden, the fact remains that persons do commit murder ; and while penalties are inflicted on the murderer, such punishment does not restore life to his victim. Moreover, there are persons who commit murder and yet contrive to remain at large. Though persons are legally authorized to use force in self-defence, such legal protection will be of little avail if the defender is no match for his adversary as regards physical force. The law imposes upon a debtor the duty of repayment, and if the creditor applies to a Court for a remedy in case of non-payment, judgment is then rendered by the Court, requiring the debtor to pay ; and if he still fails to

pay, an officer is sent to seize his property. But if the debtor has no property actually available, and dies without acquiring any property, and there is no heir, or, even though there is an heir, he has made a "limited acceptance" of the succession and does not consent to succeed to the liabilities of the deceased, all the vaunted force of the law is of no avail : the creditor is left without any remedy whatsoever.

Thus, law not being all-sufficient, something must be found to supplement its utility. Such supplement is to be found in morality, religion, conscience and custom.

CHAPTER 7.

LAWMAKING PROCEDURE.

Law is made in different ways in different countries and in different ages. There was an age when law was made by the will and action of a single person—the sovereign—and another when it was believed that law was made by man through divine revelation. At the present day, too, law in a constitutional monarchy is made in a different manner from law in a despotic monarchy ; and law in a monarchy, from law in a republic. Even in countries possessing virtually the same form of government, law is not always made in the same manner. In short, it is impossible to make a general statement under this head ; and we must content ourselves with sketching the present process of law-making in Japan. It is needless to add that, previous to the enforcement of the *Constitution*, law was made in a way vastly different from that in which it is now.

SECTION I.

LAWMAKING IN ITS NARROWER SENSE.

We have seen that law admits of two interpretations—a wider and narrower. In the narrower acceptation of the word,

law denotes what is referred to as law (*hōritsu*) in the *Constitution*—that is, nothing but what has been passed by the Diet and sanctioned by the Emperor can be regarded as law within the meaning of the *Constitution*, while certain expressions of intention of the State, other than laws, combine with laws to make up law in its wider sense. Imperial Ordinances, Cabinet Ordinances, Departmental Ordinances, Prefectural Ordinances, Metropolitan Police Board Ordinances, Formosan Government Ordinances, Saghalien Government Ordinances, Kwantung Government Ordinances, Korean Government Ordinances come all within the law in its wider sense. The law to which we refer in the present section is confined to law in its narrower sense.

Law in its narrower sense + ordinances = law in a wider sense ;

Law in its wider sense—ordinances = law in its narrower sense ;

Law in its wider sense—law in its narrower sense = ordinances.

That, in Japan, legislative power vests exclusively in the sovereign is clear from Art. 5 of the *Constitution* which provides that the Emperor exercises the legislative power with the consent of the Imperial Diet. *The Diet possesses merely the right of consent : it does not possess legislative power.* In some countries, a system is adopted under which sovereign and parliament make law between them ; but no such system is recognized under the *Imperial Constitution*.

The steps by which law is made in Japan may be summarized as follows.

SUBSECTION I.

INTRODUCTION OF PROJECTS OF LAW.

The introduction of projects of law means to lay drafts of law before the Diet. In whom, or in what body or bodies, the right to introduce projects of law vests is a matter determined

by the constitutional law of each country. That in Japan the right in question vests severally in (1) the Government, (2) the House of Peers and (3) the House of Representatives is clearly provided in Art. 38 of the *Constitution* which runs:—"Both Houses shall vote upon projects of law submitted to them by the Government, and may each initiate projects of law." In England, France, Germany, etc., the right vests also in the King, President or Emperor (as the case may be). Projects of law may be first submitted to either House, though the Budget must always be submitted first to the House of Representatives (*Law of the Houses*, Art. 53).

Each member has only a right to make a motion for introducing a project of law with the support of twenty or more members. So, a project which a member brings into the House to which he belongs is not a project of law, but a proposal to make a project of law. The Government may amend or withdraw projects of law which it has laid before either House.

SUBSECTION 2.

VOTING ON PROJECTS OF LAW.

To vote on projects of law means that the Diet decides whether projects submitted to it should be made laws or not. Projects introduced by the Government must be voted on prior to those introduced by either House and, in passing such votes, it is necessary that certain formalities should be observed. In this respect, Art. 27 of the *Law of the Houses* provides:—"A project of law shall be voted on after it has passed through three readings. But the process of three readings may be omitted when such a course is demanded by the Government, or by not less than ten members, and agreed to by a majority of not less than two-thirds of the members present in the House."

At the first reading, it is decided whether, considered as a whole, it is necessary or advisable to make a law of the given project of law. Bills brought in by the Government can be

voted only after they have been submitted to a committee for examination, though this process may be omitted on the demand of the Government in cases of urgency (*Law of the Houses*, Art. 28). On the contrary, in the case of projects of law brought in by either House, it is not absolutely necessary to refer them to the examination of a committee. In case, therefore, of a project of law brought in by the Government, the first reading determines whether it should be referred to the consideration of a committee. The second reading examines the project article by article, amending what should be amended, adding what should be added, striking out what should be struck out; while the third reading again considers the project as a whole and decides whether it should be adopted or not; and it may still amend the bill, should such course be deemed expedient. A bill which has been rejected cannot be brought in again during the same session.

SUBSECTION 3.

SANCTION OF PROJECTS OF LAW.

When a project of law has been passed by the Diet, it is submitted to the Emperor, through the competent Minister of State, by the President of the House in which it was last voted upon. A project of law is said to be sanctioned, when, in conformity with a certain form, the Emperor expresses his intention to make a law of it (*Constitution*, Art 6). Under the Japanese Constitution, the Emperor does not give his sanction in consultation with the Diet. To give sanction is an independent right of the sovereign. Nor does the sovereign exercise legislative power in common with the Diet. The sovereign may, therefore, refuse to give sanction to projects of law which have been passed by the Diet without the least amendment. All that the Emperor can do in this matter, however, is either to sanction or not to sanction: he cannot sanction projects of law subject to amendments.

The certain form which is to be complied with in giving sanction, and to which we have above referred, consists of the signature and seal of the sovereign and, in most countries, the counter-signature (s) of the competent Minister (s). Great Britain appears to be the only country where such counter-signature is deemed unnecessary. A project of law is said not to be sanctioned when the Emperor does not permit it to become law. In case a project of law is not sanctioned, the fact is, in some countries, made public in a certain form; but such is not the case in Japan. When a project of law is not sanctioned, it is to be regarded as not being sanctioned, because while the *Law of the Houses* (Art. 32) provides relative to sanction that bills which, after having been passed by both Houses and presented to the Emperor, may be sanctioned, shall be promulgated before the next session of the Diet, it contains no provision about non-sanction.

SECTION 2.

ORDINANCES (*Meirei*).

SUBSECTION 1.

COMMON ORDINANCES (*Futsū Meirei*).

It is in the exercise of the supreme power of the Emperor that ordinances are made: it has nothing to do with the Diet. Art. 9 of the *Constitution* shows that the power to make ordinances vests exclusively in the sovereign by providing that "*the Emperor issues or causes to be issued ordinances necessary for the carrying out of the Laws or for the maintenance of public peace and order, or for the promotion of the welfare of subjects, but that no ordinances shall in any way alter any of the existing laws.*" Ordinances may, thus, be classified into (1) executive ordinances and (2) simple ordinances. Executive ordinances are ordinances which are issued for the carrying out of laws; while simple ordinances are ordinances which are issued for the

maintenance of public peace and order or for the promotion of the welfare of subjects. These two classes of ordinances are issued either by the Emperor himself or caused by the Emperor to be issued by various administrative organs. Ordinances which are issued by the Emperor himself are called Imperial Ordinances (*Chokurei*), those issued by the Minister President of State, Cabinet Ordinances (*Kaku-rei*), those issued by Ministers of the several Departments, Departmental Ordinances (*Shō-rei*) ; those issued by prefectoral governors, Prefectural Ordinances (*Furei* or *Ken-rei*) ; those issued by the Chief of the Metropolitan Police Board, Metropolitan Police Board Ordinances (*Keishi-chō-rei*) ; those issued by the Governor-General of Formosa, Formosan Government Ordinances (*Taiwan Sōtoku-fu-rei*) and so on. These two classes of ordinances are collectively called common ordinances (*Futsū-meirei*) ; and the provisions of Art. 9 of the *Constitution* above quoted show that these ordinances are inferior to laws in their effect.

SUBSECTION 2.

EMERGENCY ORDINANCES (*Kinkyū Meirei*).

The nature of emergency ordinances, and the fact that they are issued in the exercise of the supreme power of the Emperor, is quite clear from the following provisions of Art. 8 of the *Constitution* :—

“In case of urgent necessity, when the Imperial Diet is not sitting, the Emperor, in order to maintain public safety or to avert a public danger, has the power to issue Imperial Ordinances, which shall take the place of Laws. Such Imperial Ordinances shall, however, be laid before the Imperial Diet at its next session, and should the Diet disapprove of the said Ordinances, the Government shall declare them to be invalid for the future.”

These ordinances are commonly called *Emergency Ordinances* (*Kinkyū Chokurei*), because they are issued in case of

urgent necessity or emergency. When the Diet is sitting, projects of law to meet even urgent necessity are to be laid before the Diet for approval, and it is not necessary that such ordinances should then be issued. Taking the place of laws when they are issued, it is but proper that such ordinances should be laid before the Diet at its next session, and that it should then be decided whether they should continue in force or not. Even if they are not approved by the Diet, however, the acts done so far under them are not rendered invalid: the ordinances cease to be *valid* only as regards the future. While common (ordinary) ordinances—that is, executive ordinances and simple ordinances, do not possess the effect of altering or repealing laws—that is, they possess only the effect of altering or repealing other common ordinances—Emergency Ordinances may conflict with laws and defeat the same. As to how they are made and issued, drafts of them are made in the Cabinet itself, or are prepared by Ministers of Departments and submitted to the deliberations of the Cabinet for approval, and then presented to the Emperor; and upon their obtaining the approval of the Emperor they acquire the validity of ordinances.

SUBSECTION 3.

REGULATIONS AND RULES OF SELF-GOVERNING BODIES.

Regulations of self-governing bodies (*jiji-tai jōrei*) are also to be included in law in the wider sense of the term. Regulations of self-governing bodies are laws issued by self-governing bodies themselves in regard to the affairs of such bodies, and to the rights and duties of the people of whom they are composed. Rules (*kisoku*) of self-governing bodies are laws provided by self-governing bodies in regard to buildings and structures held by them. The manner in which such regulations and rules are made is provided as follows in the *Law for the Organisation of Cities* and the *Law for the Organisation of Towns and*

Villages promulgated by Laws Nos. 68 and 69 of the year 1911 :—

1. *Voting*.—In order to make, alter or repeal regulations and rules of a city, the vote of the municipal assembly must be obtained (*Law for the Organisation of Cities*, Art. 42, No. 1). In order to make, alter or repeal regulations and rules of a town or village, the vote of the town or village assembly must be obtained (*Law for the Organisation of Towns and Villages*, Art. 40, No. 1);
 2. *Permission of the Home Minister*.—After the aforementioned vote has been passed, permission of the Home Minister must be obtained, so far as the regulations (*jōrei*) are concerned (*Law for the Organisation of Cities*, Art. 165 and *Law for the Organisation of Towns and Villages*, Art. 145).
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CHAPTER 8.

INTERPRETATION.

There are two ways in which a law is interpreted, namely, (1) doctrinal interpretation (*gakuri-teki kaishaku*) and (2) legal interpretation (*kyōsei-teki kaishaku*). Doctrinal or theoretical interpretation is merely interpretation from a technical point of view, and so the public is entirely free to adopt it or not. Indeed, law itself may attach a meaning to the given text different to what jurists and others deem to be its true meaning. On the contrary, legal or compulsory interpretation embodies a meaning in which it is legally ordained and required that a given law shall be understood. Legal interpretation is thus a part and parcel of the law; and persons who do not act on it act contrary to law and must be prepared for the consequence.

Laws are not always so clear in their meaning that they do

not stand in need of any interpretation. Their meaning is doubtful because of inattention on the part of the legislature, or because there are omissions in the text, or because laws do not keep pace with the progress of society. Even where the legislature has paid sufficient attention and there are no omissions in its wording, a law may still be ambiguous in its meaning. Generally speaking, however, doubts relative to the meaning of laws may be classified into : -

1. Doubts about the wording of the law itself, as, for example, in case of the word "judges" (*saiban-kwan*) employed in Art. 58 of the *Constitution*; for it is doubtful whether it refers to judges of ordinary courts of justice only, or whether the word includes also Councillors of the Court of Administrative Litigation and Consuls and prison governors in Hokkaidō, etc., who exercise judicial functions on occasion;
2. Doubts about the true and real meaning of the law though there are no doubts as to the meaning of the wording thereof, as when it is doubtful whether a law is imperative or optional; for example, under the old *Criminal Code*, it was doubtful whether a person who stole electricity should be criminally dealt with as guilty of theft or otherwise.

The promulgation of a new law is always the occasion for a vast crop of doubts to arise: there has never been a law which has been so transparently clear that it has required no interpretation or explanation. King Frederick of Prussia once issued a law forbidding people to write commentaries on the laws, but to taboo such commentaries turned out to be a task impossible even for him to accomplish. To solve and settle doubts relative to laws is not a business which concerns merely legislators, judges, administrative officials, scholars and practical lawyers; but the public in general should not fail to pay due attention to the matter, inasmuch as our rights and duties as individuals are

seriously affected by the manner in which the laws are interpreted.

SECTION I.

DOCTRINAL INTERPRETATION.

Doctrinal interpretation (*gakuri-teki kaishaku*) is classified into (1) grammatical interpretation and (2) logical interpretation. Grammatical interpretation (*bunri kaishaku*) aims at making clear the meaning of the text of a law in accordance with the meaning of the actual words and sentences; while logical interpretation (*ronri kaishaku*) aims at clarifying the meaning of a law in view of the logical connection of the text, and without any regard to the direct meaning of the words and sentences. Those who advocate grammatical interpretation hold that the meaning of a literary composition does not lie outside the words of which it is composed, but is expressed entirely by and within the scope of the words. But it would seem that it is not right blindly to adhere to the mere *ipsissima verba* only, while disregarding the meaning which is clearly implied, though not directly expressed. In interpreting a law, therefore, attention should first be paid to the words, inasmuch as it is by words that a meaning is expressed, and to interpret a law without any regard to its words is not to interpret it at all; and in applying this method of interpretation, (1) words must be interpreted in the meaning in which they are usually employed and not in a special or exceptional sense; and (2) they must also be interpreted according to the sense in which they were employed at the time of the promulgation of the given law.

Grammatical interpretation should be followed up by logical interpretation, that is, (1) it is to be ascertained for what purpose the given law exists—with the object of protecting whom has it been promulgated, in order to remove or remedy what evil has it been made, for what good or advantage has it been issued; and (2) it is necessary to consider the condi-

tion of society at the time of the promulgation of the law. But logical interpretation may not lead to the same result as grammatical interpretation. In case the result of one conflicts with that of the other, how is the difficulty to be overcome? In such case, greater importance should be attached to the result of logical interpretation, because a law is interpreted in order to ascertain the true meaning with which it has been made, and there is no reason why its letter should be followed in defiance of its spirit and intent.

There are some jurists (Savigny, for example) who are for classifying doctrinal interpretation into historical interpretation, systematic interpretation, etc. in addition to the above; but it is submitted that these kinds of interpretation should be included in logical interpretation.

Logical interpretation may be subdivided into the following three classes :—

1. *Restrictive interpretation* (*seigen kaishaku*) — an interpretation by which the wording of a law is understood more narrowly than it at first appears to suggest. For example, there is a law called the "*Kobutsu-shō Torishimari-Hō*" (literally, *Law for the Control of Dealers in Old Things* (Law No. 13 of the year 1895). Now, everything that has not been recently made is an old thing; but the law in question is intended to apply only to dealers in second-hand articles.
2. *Extended interpretation* (*kakuchō kaishaku*).—This is to give a law a wider meaning than its words directly warrant, when the words employed are not ample enough to express the meaning of the legislator. When it is written on notice-boards in public gardens, etc. that it is forbidden to injure trees, or that it is forbidden to catch birds and fishes, it is but proper to understand the prohibition to extend also to bamboos (which are not technically "trees") and to tortoises (which are neither birds nor fishes).

3. *Supplementary or rectificatory interpretation (hojū or hosei kaishaku).*—When the legislator, owing to his ignorance or inexperience, has made a law, wrongly expressing what he wanted to say, or not fully defining what he wanted to determine, it is obvious that it will be contrary to the intention of the lawmaker to interpret the law in blind adherence to its wording. Besides, the progress of society may sometimes make it very necessary that some modification should be introduced into the meaning of a law. To interpret a law in this way, supplying what it has left unexpressed, or adapting it to an altered state of things, is what is known as supplemental or rectificatory interpretation. For example, the Aquilian law of Rome at first recognized that if "A" should injure material things belonging to "B," "B" was entitled to damages from "A;" but afterwards the provision came to be understood as covering damages for *bodily* injuries also. In Rome, again, the property of a person who died a prisoner of an enemy was at first regarded as "ownerless things"—things unfit to be the subject-matter of succession; but later on the interpretation was so modified that it was considered as the proper subject-matter of succession. Considered from another point of view, however, supplemental interpretation is objectionable, in that it may sometimes give a law a turn wholly unintended by the lawmaker. Savigny and Vangerow are, therefore, against supplementary interpretation, holding that it is inadmissible to alter the meaning of a law by means of interpretation. Those who advocate supplemental interpretation do so on the ground that, in interpreting a law, more importance should be attached to the intention of the legislator than to the words. If supplemental interpretation is not to be admitted, both restrictive

interpretation and extended interpretation must likewise be held inadmissible. If rectificatory interpretation is not to be admitted, even where the legislator has obviously committed a mistake, how is such a mistake to be rectified? Though some jurists fear that rectificatory interpretation may have the result of interpreting and applying a law contrary to the intention of the legislator, yet when it is clear beyond any doubt that the legislator has committed an error, to set the matter right by rectificatory interpretation must be regarded as a course more agreeable to the intention of the legislator than to perpetuate his error. But it is hardly necessary to add that this method of interpretation should not be employed hastily or carelessly, but only with due care and anxious deliberation.

The following may be added as principles governing doctrinal interpretation.

1. When words employed in a law are not definite, they are to be widely interpreted. This is what is meant by that legal proverb which runs: "What is not distinguished by law must not be distinguished." Words employed in a law must not be interpreted with special rigour. For example, the word "*person*" is to be taken as meaning both natural and juridical persons and covering male and female, young and old; and, unless otherwise provided, the word "*vehicle*" is to be interpreted as meaning vehicles of all kinds: it is to be taken in the special sense of a particular kind of vehicle such as a jinrikisha, carriage, ox-car, bicycle, motor-car, etc., only when there is a special provision to that effect.
2. Laws concerning special rights, penal laws, obligatory laws and exceptional laws are to be interpreted strictly, because these laws have a serious effect upon the rights and duties of individuals.

SECTION 2.

LEGAL INTERPRETATION.

Legal or "compulsory" interpretation (*kyōsei-teki kaishaku*) is an interpretation to which obedience is required by the power of the State. Compulsory interpretation is classified into (1) legislative interpretation, (2) judicial interpretation and (3) administrative interpretation.

1. *Legislative interpretation* (*rippō kaishaku*) is an interpretation of a law provided by the legislator himself by means of law. This kind of interpretation is recognized by Savigny, Dernburg and others. Savigny, especially, holds that legislative interpretation being an interpretation of law by law, it must be regarded as law rather than as interpretation. What he means by this is that such interpretation is not necessarily proper in itself but is valid as law, and the people are required to obey it not as an interpretation but as a law. There are three ways in which legislative interpretation is effected :—

1. Interpretation by means of a separate law or ordinance, as, for example, the Civil Code is interpreted by the *Law Concerning the Application of the Civil Code*. Another fit illustration may be quoted from one of Dernburg's works :—

By virtue of a mandate given by a law of the 21st October, 1878, the Chief of the Berlin Police Board, while the Diet was sitting, endeavoured to compel the socialist Members of the Diet to withdraw from Berlin; and this gave rise to disputes as to whether the Chief of the Metropolitan Police Board possessed such authority, and whether Members of the Diet who did not withdraw from the capital in compliance with such an order rendered themselves liable to a penalty. The judges sustained the action of the Chief of the Metropolitan Police Board; but before their judgment had become irrevocable—that is,

on the 30th May, 1880—a law was issued by which the said law of the 21st October, 1878 was interpreted to the effect that it was not applicable to the Members of the Diet, while the Diet was sitting; and so the incident was closed.

2. Interpretation given in the same law or ordinance, as, for example, "things" are defined by Art. 85 of the *Civil Code* as material objects; or the word "soy" is interpreted by Art. 1 of the *Rules Concerning Taxes on Soy* (*Imperial Ordinance No. 47* of the year 1888) as including "tamari" also; or what officials are entitled to pensions is explained in Arts. 1, 9, 12 and 14 of the *Law Concerning the Pensions of Public officials* (*Law No. 43* of the year 1890); or "relatives," are defined by Art. 725 of the *Civil Code* as meaning blood-relations within the sixth degree of relationship and relations by affinity within the third degree of relationship; or a "trader" is explained by Art. 4 of the *Commercial Code* as a person who, in his own name, carries on commercial transactions as a business; or a "dealer in second-hand articles" is defined by Art. 1 of the *Law for the Control of Dealers in Second-Hand Articles* (*Law No. 13* of the year 1895) as a "person who makes it his chief business to buy, sell or exchange articles which have once been used, before or after repairs have been made to the same;" or "infectious diseases" are defined by the *Law Concerning the Prevention of Infectious Diseases* (*Law No. 36* of the year 1897) as consisting of "cholera, dysentery, abdominal typhus, small-pox, measles, typhus, scarlet fever, diphtheria (including croup) and the pest;" or Art. 1 of the *Rules for the Control of Dairymen* (*Home Department Ordinance No. 15* of the year 1900) provides that the term "milk" in the sense of these Rules means whole or

entire milk and skimmed milk for the purpose of sale, and that the term "milk products" means condensed milk and milk powder; Art. 1 of the *Law Concerning Sewage Works* (*Law No. 32* of the year 1900) provides that "*sewage works*" within the meaning of this Law means drain-pipes and other draining courses constructed for the purpose of discharging foul water and rain water in order to keep the land clean and tidy, and the arrangements accessory thereto; or the word "orphans" is defined by Art. 8 of the *Law Concerning Succour to the Bereaved Families of Public officials* (*Law No. 44* of the year 1890) as "unmarried males and females under twenty years of age who have neither father nor mother."

3. Interpretation by instructions in answer to enquiries,— When, for example, a prefectoral governor makes an enquiry of the Home Department, and the latter gives an instruction in answer, it may be regarded as a kind of interpretation.

There are three principles governing legislative interpretation—namely, (1) that legislative interpretation possesses no retrospective effect—that is, it is only effective subsequent to the issue of that law which contains such interpretation; (2) that legislative interpretation being a sort of law, it is binding upon the nation in general as well as on judges and administrative officials; and (3) that opinions which persons who participated in the making of a law expressed at that time, or have afterwards expressed, in regard to the law do not possess the effect of legislative interpretation, inasmuch as such opinions are not the opinions of the state, but merely private opinions of the persons who participated in the making of the law.

2. *Judical interpretation* (*shihō kaishaku*).—This is an interpretation of a text of the law which is given by a judgment. In pronouncing judgment, judges are not bound to hear the opinion of the legislator in regard to the meaning of the law, nor is it neces-

sary for them to make enquiry of their superiors. They are to interpret the law just as they deem proper, entirely in accordance with the dictates of their intelligence and knowledge, and persons in regard to whom judgment is rendered are bound to submit to such interpretation on the part of the judges. Judges are bound by legislative interpretation; but they are not bound by administrative interpretation—this is a result following from the fact that the judicial authorities exercise functions entirely different from those entrusted to the administrative authorities.

Judicial interpretation is not binding on the nation in general or on other courts, so the courts are not necessarily bound to interpret the same text of the law in the same way. But opinions expressed by the Supreme Court on points of law are binding on all inferior Courts, for Art. 48 of the *Law of the Constitution of the Courts of Justice* provides that opinions expressed by the Supreme Court on points of law when rendering judgments are binding on inferior courts in all matters relating to the actions in question—a provision which has been made with a view to insure uniformity in interpretation. Further, Art. 450 of the *Code of Civil Procedure*, providing that a court to which a case is sent back or transmitted (by the superior court) is bound to base the new oral proceedings or judgment on the opinion of the Supreme Court on the basis of which the (old) judgment has been quashed, the inferior court is, here, likewise barred from interpreting law in a manner different to that of the superior Court.

3. *Administrative Interpretation (gyōsei kaishaku).*—Administrative interpretation being interpretation of a law by the administrative authorities for the purpose of enforcing the same, it is effective only in so far as the enforcement of the law is concerned and in no other respect whatsoever. Nor is it binding on judges or legislators. The only persons who are bound by it are (1) the administrative officials of lower rank and (2) the people to whom the law is applied according to such interpretation.

CHAPTER 9.

CLASSES OF LAWS.

SECTION I.

GENERAL LAWS AND SPECIAL LAWS.

The classification of law into general and special laws is based on the greater or lesser extent to which laws are operative. General laws (*ippan-hō*) are laws which are universally operative, while special laws (*tokubetsu-hō*) are those which are operative within certain restricted limits. And such limits may be (1) territorial, (2) of persons on whom the laws are binding or (3) of legal relations to which they are applicable. As for limits of time (within which the laws are applicable), a consideration of this subject is reserved for Chapter XI.

1. *General and special laws in regard to territory.*—General laws in regard to territory are those which are applicable in all parts of a given country; while special laws are those which are applicable in a certain part only. Laws, for example, which are applicable throughout the Empire of Japan are general laws, while those which are operative in Formosa only are special. The *Law Concerning Administrative Execution* is a general law, while the *Police Ordinance* operative in (say) the Prefecture of Kanagawa only is a special law. To illustrate this further by foreign examples:—Laws operative throughout the United Kingdom and the British Colonies and dependencies are general laws, while laws which are operative in the United Kingdom only, or in any one of the British colonies or dependencies only, are special laws. The German Constitution and Criminal Code are general laws, while the Civil Code which was formerly operative in Prussia only, and the Law of Nationality which is operative in Bavaria only, are special laws. It should be noted that even if some laws of one country happen to be the same as those in force in another, they cannot be

regarded as "general," because the distinction between general and special laws is a distinction between laws under one and the same sovereignty, and not between the laws under two or more sovereignties. In other words, laws cannot be regarded as general or special, unless they have been made by the legislator with the intention that they shall be enforced within certain limits only.

2. *General and Special laws in regard to persons.*—Laws which are binding on all persons alike are general, while those which are binding on specific persons only are special. Specific persons are persons who are distinguished from others in view of their business or profession, personal status, social position, capacity, etc. Thus, the law governing marriages of the members of the Japanese Imperial Family (*Imperial House Law*, Arts, 39, 40, 41 and 44) and the law applying only to marriages of members of the military and naval forces are special laws. So is the *Public Service Regulations* (*Imperial Ordinance No. 39* of the year 1887), which is a law only applicable to public officials. The same applies to the *Ordinance Concerning the Hereditary Property of Peers* (*Imperial Ordinance No. 34* of the year 1886) and the *Ordinance Concerning the Disciplinary Punishment of Peers* (*Imperial House Ordinance No. 6* of the year 1911)—which are both laws concerning peers only—the Military and Naval Criminal Codes, etc., etc. On the other hand, the *Constitution*, the *Civil Code*, the *Code of Civil Procedure*, the *Code of Criminal Procedure*, the *Law Concerning Family Registries*, etc. are general laws. Though a general law may sometimes contain provisions relating to specific persons—as, for example, the *Civil Code* contains provisions relative to minors, lunatics, idiots and spendthrifts—it cannot on that account be regarded as a special law.

3. *General and Special laws in regard to legal relations.*—Based on a consideration of whether they are applicable to legal relations in general or to specific legal relations only, this classification of law is not an absolute but merely a relative one. A

law may be a special law in regard to another, while it is a general law in regard to another special law. For example, the *Commercial Code* is a special law, because it is a law relating to commercial transactions; but it is a general law in regard to special laws dealing with particular branches of commercial transactions, such as the *Law for the Control of Pawnbrokers* (*Law No. 14 of the year 1895*).

The classifications above enumerated, however, are not always distinct from each other. A special law with regard to territory may also be a special law in regard to persons, as such and such a Prefecture's *Regulations for the Control of Keepers of Public Bath-houses*; or a special law in regard to persons may at the same time be a special law in regard to legal relations as laws governing the collection of special taxes from persons engaged in certain special legal relations (as the *Law Concerning Taxes on the Brewing of Saki*), the *Procedure for the Preservation of the Property of Deceased Foreigners* (*Department of Justice Ordinance No. 40 of the year 1899*) and the *Law Concerning Assistance in Connection with the Arrest and Detention of the Crews of Foreign Vessels* (*Law No. 68 of the year 1899*).

As a result of the progress of society, there are cases where a special law yields to a general law, or a general law is encroached upon by a special law. A special law yields to a general law when it is no longer necessary that there should be such special law in regard to the territory, persons, or legal relations in question, or in order that the evils incident to such special law may be removed. For example, owing to the repeal of a special law by virtue of which Hokkaidō and Okinawa Prefecture were exempted from the application of the *Conscription Ordinance*, these islands are now subject to the general *Conscription Ordinance*. The same applies to the repeal, subsequent to the Restoration, of special laws concerning pariahs or outcasts (*eta-hinin*), the law forbidding the marriage of priests and nuns, and the law authorizing a certain class of men (the *samurai*) to cut down people in the streets with impunity (*kirisute-gomen*) under certain conditions.

A special law is partitioned off from a general law when it is found necessary that certain persons, a certain tract of territory, or certain relations, should be newly placed under a special law. For example, the inclusion of Formosa and Saghalien in the Japanese Empire has necessitated special laws applicable to Formosa and Saghalien only ; the invention of the telephone has made it necessary that there should be a law concerning telephones ; the extensive use of bicycles has resulted in the making of a special law levying taxes on such vehicles ; the appearance of motor-cars has resulted in a law for the control of such cars ; while the development of aeronautics is certain to produce special legislation regarding flying machines. The construction of railways has given rise to railway regulations ; and owing to the increase of foreigners resident in the country many laws have been enacted with regard to aliens.

The practical advantage of distinguishing general laws from special laws consists in determining their relative effect, the rule being that special law supersedes general law—that is, in case there is a conflict between a general and special law dealing with the same subject, it is the special law that is to govern. For example, even though Japanese male subjects are, according to a general law, amenable to military service upon their attaining the age of twenty years, yet there is a special law according to which, for persons who are studying at certain schools, enlistment may be postponed until the age of twenty-eight. In such a case, the latter special law governs, and youths who are students of certain schools may have their enlistment deferred during the specified period. But to the rule that a special law governs in the place of a general law, there is an exception ; and this is where there is an established rule according to which certain general laws always possess a greater effect than certain special laws. When, for example, a special law issued in the form of an Imperial Ordinance conflicts with a general law issued in the form of law, the general law is always to be followed instead of the special law. In the same way,

when the *Law of the Constitution of the Courts of Justice* conflicts with the *Constitution*, the latter is to govern. Further, there being another rule according to which a later law defeats an earlier law, the provisions of a special law may be rendered nugatory by a general law made subsequent thereto.

SECTION 2.

WRITTEN AND UNWRITTEN LAW.

Law is classified into written laws and unwritten laws in view of the form in which they exist. Written laws (*seibun-hō*) are made and promulgated and are written down in documents, while unwritten laws (*fubun-hō*) are not written down in public documents and possess the effect of law simply by virtue of public recognition. "To be written" in this connection means to be written in such a manner as enables the thing to acquire the effect of "law." Even unwritten law may be recorded—for example, in the works of jurists or the common place books of judges; but all this does not make the law a "written law," because it is not written in such a form as to confer upon the writing the effect of "law."

Following the development of law, there is a tendency towards unwritten laws being gradually transformed into written laws. Though there are persons who hold that where there is no law, there can be no judgment, this is an exceedingly erroneous view. Law—especially written law—is a thing of a later origin than custom and judgment. In ancient times, each particular case was decided by the King or tribal chief at his discretion. He did not make law first and then render judgment according to such law. It is out of a confused mass of customs and judicial precedents that written law has been gradually evolved. As things stand now, indeed, the judge in criminal cases can render no judgment where there is no express provision in the law warranting his action; but in former days, when the law was still undeveloped, the judges, whether in civil or

criminal cases, rendered judgments even where there were no relevant provisions on the statute book.

Though unwritten laws are, as a rule, destined to become written laws, there are exceptions to this rule also. There are cases where the rule in question is entirely reversed—as, for example, when the written laws which had so far existed in France became unwritten laws in consequence of the Revolution, or when, as the result of the successful declaration of independence by the United States, the laws given by Great Britain to the American colonies became unwritten laws. In other cases, the written laws of one country become unwritten laws of another; and yet, in others, the written laws of one country become the foundation for the unwritten laws of another country—as, for instance, Roman law has, to a certain extent, become a source of law in Great Britain, France, Germany, etc. Rome never issued laws for these countries; the latter merely adopted certain provisions of the Roman law as proper and reasonable. There are also cases where the unwritten laws of one country become the unwritten laws of another. The foregoing may be summarized as follows:—

1. The unwritten laws of a country are sometimes developed into the written laws of that country;
2. The written laws of a country sometimes become the unwritten laws of that country;
3. The written laws of one country sometimes become a basis for the unwritten laws of another;
4. The written laws of one country sometimes become a basis for the written laws of another country;
5. The unwritten laws of one country sometimes become a basis for the unwritten laws of another;
6. The unwritten laws of one country sometimes become a basis for the written laws of another.

Besides customs and judicial precedents, the opinions of jurists may, sometimes, constitute a basis on which the law (whether written or unwritten) of a country are founded. The

Emperor Theodosius, for example, gave the effect of law to the opinions of the five great luminaries Gaius, Papinian, Paul, Ulpian and Modestinus, the views of Papinian being followed when the opinions of these writers were equally divided.*

Written law and unwritten law each have advantages and drawbacks. Administered by really good judges, unwritten law is productive of excellent results, because instead of being bound and restrained by the intention of the lawmaker (as they must necessarily be in the case of written law), they may modify the law according to the practice of the given time and the reason of things, and also according to the changes which may take place from time to time ; but when it is administered by bad or inferior judges, the absence of definite provisions will often lead to the abuse of the law, the screening and shielding of criminals, and the incrimination of the innocent. Experience shows that written law is practically the most effective means of remedying this evil. Where there are express provisions, the question of who is the person entitled, and who is the person liable, is clearly fixed beforehand ; and so it prevents judges from acting partially, however much they may be inclined to do so. Besides, defects in written law can be easily removed. But still it cannot be said that written law is open to no objection whatever. It has the drawback that the existence of written law tends to make the judges adhere slavishly to its letter and prevent them from rendering flexible judgments according to varying circumstances. Another drawback of written law is that while cases may be adjudicated upon without any hitch where concrete and relevant provisions exist, when there are no such provisions penalties cannot be imposed even for acts of the most heinous description. In short, under written law, it is to be feared that depraved persons may search for defects and thus contrive to commit crimes with comparative impunity.

When a written law exists side by side with an unwritten law, the written law is to be followed, because written law is

* *Law of Citations.* B.C. 426.

definite, while unwritten law is comparatively indefinite and unreliable. This principle was emphasized by Art. 3 of The "Rules for the Conduct of Judicial Affairs" (Decree No. 138 of the year 1875) as follows :—

"Civil cases are to be adjudicated upon according to the provisions of the written law, where a written law exists, or according to custom where no written law exists, or according to reason where no custom exists."

Criminal cases can only be adjudicated upon according to written law ; and this is the reason why the above provision is specially confined to *civil cases only*. Custom publicly recognized is neither more nor less than unwritten law. Where neither written law nor unwritten law exists, the judge is required to render judgment according to the dictates of reason—that is, in accordance with what seems to be right in the light of his personal conviction. When the *Commercial Code* (Art. 1) provides that "in case there is no provision in this Code as to a commercial matter, the customary commercial law shall apply, or if there is no such customary law, the *Civil Code* shall be applied," the Code provides that unwritten commercial law is less effective than written commercial law, but it is more effective than written law as given in the *Civil Code*—in short, it recognizes an exception to the rule that written law is more effective than unwritten law. Arts. 217, 219, 228, 263, 269, 277 and 278 of the *Civil Code* also contain provisions concerning cases where custom governs in preference to express provisions of that Code. Further, there are provisions according to which, notwithstanding the fact that there is a written law, *the parties* are enabled to follow unwritten law instead of such written law, if they choose so to do, the provision of Art. 92 of the *Civil Code* (which rules that in case there is a custom different from laws and ordinances not relating to public order, if it is recognized that the parties to a juristic act intended to conform thereto, such custom is to govern being a case in point. Art. 91 of the *Civil Code* also

provides that when the parties to a juristic act have expressed an intention different to the provisions of a law or regulation which does not relate to public order, such intention is to be followed. Thus, even if the parties have agreed not to affix stamps on a loan bond, such agreement is void because it is contrary to a law relating to public order. On the contrary, a creditor may agree with his debtor so as to make the obligation between them performable elsewhere than at the place of the domicile of the creditor (though an obligation is, as a rule, performable at the place of the domicile of the creditor), because such agreement is not contrary to a law relating to public order.

SECTION 3.

COMPULSORY (IMPERATIVE AND PROHIBITIVE) LAWS AND OPTIONAL LAWS.

A compulsory law (*kyōsei-hō*) is a law the application of which the parties to a juristic act are not at liberty to modify at their discretion, while a law, the application of which the parties may freely modify, is an optional law (*nin-i-hō*). Strictly speaking, laws are laws because individuals are not permitted to modify their application at their choice. Regarded in this light, it would appear that there can be no optional law. But a law, in respect to which the parties to a juristic act may, to some extent, mutually arrange as to whether it shall be binding upon them or not, is said to be an "optional law"; while a law, upon the application of which individuals may impose no such restriction, is said to be a "compulsory law." Even in the case of an optional law, however, it is a matter of course that it is binding on the parties, when an act has been done and executed under it. On the other hand, there are laws according to which to do certain juristic acts or not is left to the choice and discretion of individuals; and such laws are also called optional laws. In this sense, laws ordering taxes to be paid or requiring persons to serve in the Army or Navy are compulsory laws, as is also the *Criminal*

Code; while the law governing succession to property (as opposed to succession to a house) is optional, as individuals may, at will, choose whether to enter upon, or refuse, such succession. In short, laws which are always and absolutely binding on persons are compulsory laws; while laws which need not necessarily be followed, if one keeps aloof from certain limits laid down therein, are optional laws.

There are persons who hold that public laws are compulsory, while private laws are optional. But this is a mistake, as there are some public laws which are optional. For example, an election law is a public law; but electors are not forced to exercise their electoral rights, and may leave them unexercised if they so choose. Nor is a private law always optional. For example, when a person is adjudicated incompetent in accordance with the *Civil Code*, he cannot oppose or nullify such adjudication at his option.

Compulsory laws may be subdivided into imperative laws (*meirei-hō*) and prohibitive laws (*kinshi-hō*). Laws by which it is positively commanded that such and such acts shall be done are imperative, while laws by which it is negatively commanded that such and such shall not be done are prohibitive. Taxation laws are of the former, while criminal laws are of the latter class. It goes without saying that whether laws are imperative or prohibitive, persons who have violated them are alike liable for the consequences.

There are prohibitive provisions the violation of which entails no criminal penalty, nor is the act of violation civilly void. For example, even if a debtor agrees with his creditor to pay interest at a rate exceeding the maximum legal rate (twelve per cent. per annum for sums of not less than 1,000 *yen*), the law takes no cognizance of the act until the matter is brought to the notice of the Court, when it only orders the rate to be reduced to the maximum legal rate. In ancient Rome, it was provided (by the *lex Cincia*, B.C. 204) that no person should make an excessive gift to another, but in case an excessive

gift was made, the law did not consider it null and void *ipso facto*, nor was any penalty inflicted on the donor and the donee. It was only when the party to whom the gift was promised brought an action against the party who promised it to him that the law stepped in and refused to grant any remedy to the plaintiff.

SECTION 4.

SUBSTANTIVE LAWS AND ADJECTIVE LAWS.

A substantive law (*jittai-hō*) is a law which determines the substance of rights and duties, while an adjective (formal) law (*keishiki-hō*) is a law which is auxiliary to a substantive law—that is, a law which chiefly provides the procedure for exercising rights and causing duties to be performed. For example, the *Constitution*, administrative laws, the *Civil Code*, and the *Criminal Code* are substantive laws for which the *Law of the Houses* and *Election laws*, the *Law Concerning Administrative Litigation*, the *Code of Civil Procedure* and the *Code of Criminal Procedure* are adjective laws.

In short, substantive laws are laws which determine the relations of rights and duties among the people themselves and the relations between the people and the state; while adjective laws are laws which provide for the operation of substantive laws, and/or for penalties to be imposed on persons who do not conform to substantive laws. There are some persons who hold that an adjective law is one which provides the manner in which penalties are to be imposed on persons who have violated those rights or failed to perform those duties which are provided in a substantive law; but the scope of an adjective law is not so limited as that. How to bring an action, within what period appeal is to be made against a judgment with which one is not satisfied, by the conference of how many judges judgments in such and such a Court are to be rendered, etc. are also matters which are provided for in an adjective law. But a

law is not always made up exclusively of the elements of a substantive law or of an adjective law. In some laws the elements of both substantive and adjective laws are blended ; and substantive laws usually contain many provisions relating to procedure or penalties.

SECTION 5.

INDIGENOUS AND INHERITED (ADOPTED) LAWS.

An indigenous law (*koyū-hō*) is a law which has not been based on a foreign model, but has been made on the basis of the local conditions, manners and customs, etc. of a given country—that is, has developed out of the local conditions, manners and customs, etc. of the country. An inherited (adopted) law (*krishō-hō*) is a law which has been constructed on a foreign model—that is, after the example of a foreign law—and it is a matter of indifference to what extent a foreign model has been availed of. In some cases, a foreign law is translated bodily and adopted forthwith as a law of another country. In Belgium, for example, the Napoleonic Code was adopted and promulgated, and so made to possess the effect of a law ; and it is provided that in case of any doubt in law, the French Civil Code shall be followed. Such a law is an inherited (adopted) law in its purest form ; but there are many inherited (adopted) laws which are such merely in spirit or merely in form. The old Japanese Criminal Code was modelled on the French Criminal Code, while the present Japanese Code of Civil Procedure is largely modelled on the German Code of Civil Procedure.

The inheritance (adoption) of laws gives rise to the distinction of laws into child and mother laws. The Roman law, for example, was the child law of the Greek law, because the latter was the mother of the former. On the other hand, Roman law is the parent law to the laws of most of the European countries of the present day. Parts of the Japanese law being child law *vis-à-vis* the laws of certain European

countries, and the laws of such European countries being in their turn child laws to Roman law, Roman law is the parent law of the parent law of parts of the Japanese law. This is what is technically called indirect inheritance, while the other is called direct inheritance.

The practical advantage of distinguishing between indigenous and inherited (adopted) laws is that in case there is a doubt in an inherited law, it can be solved by reference to the spirit of the parent law. It is thus necessary for persons who wish to study a child law to trace up to its fountain head, and study, the parent law, and the parent law of the parent, law of such law.

In ancient times, the laws of various countries were mostly indigenous; but now that intercourse with foreign countries is so frequent, there are few countries which are governed by indigenous laws only. On the other hand, there are few laws which are modelled so entirely on foreign laws that they attach no importance to indigenous practice and usage. The Japanese Civil Code, for example, contains a large mass of indigenous law (so far as the family and succession are concerned) while the greater part of the balance is of the nature of inherited (adopted) law.

SECTION 6.

PUBLIC AND PRIVATE LAW.

The distinction between public (*kōhō*) and private law (*shihō*) is drawn in view of the substance [of the law, though opinions differ as regards the exact standard for such distinction. They may be summarized as follows:—

(1) *Public laws are laws relating to public interests, while private laws are laws relating to private interests.*—Originally advanced by Ulpian, the great Roman jurist, this theory is supported by modern jurists—more especially, many German jurists. Ulpian says: Laws which relate to the institutions of

the Roman Empire are public, while those which concern the convenience of private individuals are private. According to this view, laws which for example, relate to the relations between the state and criminals, and to election, are public, while those which refer to buying and selling, lending and borrowing, family relations, succession, etc. are private. For the application of this theory, however, it is necessary to discover a standard by which to distinguish matters relating to public interests from those relating to private interests : but, as a matter of fact, there are matters which relate not merely to public but also to private interests, and others which relate not merely to private but also to public interests. Indeed, there are but few matters which relate exclusively to public interests or exclusively to private interests. For example, robbery is an act which affects the interests of the State ; nevertheless it is individuals, rather than the State, who are directly damaged by the criminal act ; and so, robbery may be regarded as a matter relating to private interests as well. Again, even lending and borrowing, which is generally held to be a relation affecting private interests, and which, no doubt, does affect private interests, may be regarded as relating to public interests also, because if debtors should fail to pay the monies they owe, it might have the effect of disturbing the national economy and subverting the order, or even the existence, of the State itself. There are some people who say that laws which provide for rights or claims which can be enforced by means of civil actions are private laws ; but this definition really does not serve to elucidate the nature of private laws : certain rights can be enforced by means of civil actions, because they are provided for in private laws : and to say that laws which provide for such rights are private laws is merely to beg the question—a sort of *circulus in probando*. Hence a modification is proposed by some to the effect that laws which govern matters *directly* relating to public interests are public laws, and that those which govern matters *directly* relating to private interests are private laws ; but this, too, merely serves to shift the difficulty from one

quarter to another, since it is not always easy to determine whether it is directly or indirectly that a given law relates to public or private interests (as the case may be).

(2) *Laws the enforcement or non-enforcement of which depends on the choice of the persons entitled are private, while other laws are public.*—This means that laws governing rights which individuals may freely waive are private, while those governing rights which cannot be so waived are public. Thus, the law governing lending and borrowing is a private law, because the creditor may waive his right against the debtor; while the *Criminal Code* is a public law, because a person who has been wounded by another may not condone the offence at will. But this distinction, too, is not quite free from objection, because even among public rights there are some which admit of waiver, such being electoral rights, the rights of action against an offence prosecutable on the complaint of the injured party or his legal representative (*shinkoku-zai*, such as libel, rape, etc.); and on the other hand there are rights under private law which cannot be waived: for example, the rights of the head of a house, parental power, and the rights of a husband cannot be waived, because the waiver of such rights is apprehended to be prejudicial to the order of families and consequently to that of the State.

(3) *Laws which govern relations between the State and individuals are public laws; while laws which govern relations between individuals themselves are private* (Holland, Bluntschli, Pradier-Fodéré).—The objection to this theory is that it is not always easy to determine whether a given relation is one between the State and individuals, or one between individuals themselves. There are many relations between individuals which are at the same time relations between the State and individuals and *vice versa*. For example, election laws are laws which govern relations between individuals themselves; but they are regarded as public laws; while relations of rights and duties formed in respect to public funds, to which individuals have subscribed at the invitation of the State, are relations between the State and indivi-

duals, but the law governing such relations is usually held to be a private law. The *Code of Civil Procedure* is a law which provides procedure in accordance with which actions are brought and carried on by individuals against individuals ; but it is classed as a public law by the jurists of the present day. In order to remove this difficulty, a modification similar to that for the first mentioned theory is also suggested for the theory under consideration. Thus it is held that laws which *directly* govern relations between the State and individuals are public ; while laws which *directly* govern relations between individuals themselves are private ; but this distinction is as ambiguous and unsatisfactory as the modification suggested for the theory described under (1).

(4) *Laws governing relations in which individuals act as members of the State are public, while laws governing relations in which they act as private members of society are private*—a theory which is supported chiefly by German jurists such as Gierke, Savigny, Puchta, Arndt and Ahrens. But this may be defeated by the argument that laws do not exist where there is no State, and there are no laws which govern acts done by individuals merely as private members of society. Besides, it is often difficult to determine whether given acts are done by persons in their capacity as members of the State or as private members of society. And it may also often happen that acts affecting the order of the State affect the order of society also. Homicide, for example, and acts of a similar nature, are acts injurious to the order of both the State and society.

(5) *Laws which govern relations of power (authority) are public, while those which govern relations of right are private* (Langenn and Merkel), relations of power (authority) (*kenryoku-kwansei*) in this connection meaning relations in which one person is subject to the authority of another ; and relations of right (*kenri-kwansei*), relations in which persons are on an equal footing. This theory is, however, open to the objection that relations of power and relations of right are inseparable from

each other, because rights (under municipal law) can only come into existence where there is a State to exercise authority. Besides, if the laws which govern relations of subjection or authority were public laws, the *Civil Code*, which provides for parental power, would have to be regarded as a public law, because parental power is the power of a parent *vis-à-vis* his or her children, and implies the subjection of the children to the parent in matters relating to their persons and property. In the same way, a law which governs the relations between masters and servants would have to be considered as a private law, because it governs the relation of subjection of servants to masters. If, again, laws which govern relations on an equal footing were private laws, an election law, too, should be regarded as a private law, because it governs relations between electors and candidates, who are on an equal footing.

(6) *Laws by which the State provides for acts of the State itself are public; while laws by which the State provides for the acts of individuals are private.*—Thus, the *Conscription Ordinance* by which the State enrolls all able-bodied adults in the military service, various taxation laws by which it collects taxes, penal laws by which it punishes criminals, election laws by which it causes elections to be effected, are all public laws; while those which govern relations such as lending and borrowing, buying and selling, etc. are private laws, because they determine what it is proper for individuals to do or refrain from doing. This appears to be the most reasonable standard of distinction between the two classes of laws under consideration.

SECTION 7.

MUNICIPAL AND INTERNATIONAL LAW.

The classifications so far enumerated (Sections 1-6) are classifications of municipal laws only. The classification under this Section is, however, of laws in general. Municipal laws (*kokunai-hō*) are laws which govern acts of the State and acts

of individuals in connection with the affairs within the State, while international laws (*kokusai-hō*) are laws which govern the relations between State and State.

So long as the demands of individuals, or of the State, are fully satisfied within the State, municipal laws are all that are required. But when they cannot be satisfied within the limited territory of the State, it becomes necessary that international regulations should be established. As municipal law owes its existence to a common desire to avoid conflicts and promote peace between individuals, so international law owes its existence to the common desire of nations to avoid conflicts and promote peace between states. In other words, international law is based on the sense of common interests as much as municipal law. The most notable points which distinguish international law from municipal law are as follows :—

1. There is no sovereignty over states, and, consequently, international law does not, like municipal law, derive its effect from the command or recognition of a sovereign: it becomes binding upon the nations simply by virtue of agreement among them;
2. No security exists for self-help (such as war) under international law, while, on the contrary, full security is afforded by the state for self-help under municipal law, as, for example, a person who has killed another in justifiable defence is not liable to punishment;
3. While the organs for execution of municipal law are highly developed, the organs for execution of international law are still in a stage of infancy. Under municipal law, there are—for example—complete arrangements for the punishment of criminals; but international law furnishes no reliable and authoritative means by which punishment can be inflicted on, or compensation exacted from, a state which has acted illegally towards another.

CHAPTER 10.

SOURCES OF LAW.

The term "sources of law" (*hōritsu no eingen*) refers to and denotes the materials on which law is based. The term is employed in various senses. It is sometimes employed in the sense of whence law has originated, some saying that it originated from the will of God, others that it originated from the will of the sovereign, or that it originated from the combined will of the people. It is sometimes used in the sense of the cause of legal relations, it being held that contracts, unlawful acts (torts), unjust enrichment, etc. are sources of law. But these are really the causes of legal relations and not sources of law. Legal relations are protected as such only after law was come into actual existence, and it is obviously and logically wrong to consider relations which come into existence subsequent to law as sources of law. There are others who employ the term in the sense of the source of knowledge of law (as the works of legal writers). But in this connection, we employ the phrase "source of law" in the sense of the materials on which law is based. The sources of law may be classified into the following seven classes.

SECTION I.

CUSTOM.

"Custom" (*kwanshū*) is a standard of action which has long been observed and acted on by the people. The point which requires special attention in this connection is the difference between custom and customary law (*kwanshū-hō*). So long as it does not become law, custom remains merely custom. Custom becomes customary law only after it has acquired the force of law. *Custom, therefore, is a source of law; but customary law is not: it is rather law itself.* But customary law

may be a source of written law. Customs may be classified as follows :—

(1). *General and local customs.*—General customs are those which are operative throughout the country, while local customs are those which prevail in certain localities only. In ancient days, when intercourse was hampered by many obstacles and hindrances, there were very few general customs, but a large number of local customs.

(2). *Common and special customs.*—Common customs are those prevailing among all classes of men, while special customs are those observed among persons of a certain status, position or profession only. Commercial customs, for example, are special customs, because they are customs only observed among traders.

(3). *Written and unwritten customs.*—Custom does not become law because it is put on record. Written customs are customs merely reduced to writing, as the *Sachsenspiegel* of Germany. In order that they may become law, it is always necessary that steps should be adopted for conferring the force of law on them.

From what has been so far said, it will be clear that custom is not law ; but it is no easy matter to say when custom becomes customary law. The following are some of the various theories which exist with reference to this question :—

(1) *When it is believed in by people.*—According to this theory, custom becomes customary law, when people have come to do as by law what they have so far done by custom ; and it is based on the theory that law is derived from the combined will of the people. This view therefore is incorrect, if the notion that law is derived from the combined will of the people is erroneous. Besides, how is it to be determined whether a certain custom is popularly believed in as if it were law ? and, if so, when has it come to be so believed in ? In short, the theory is surrounded with ambiguity in all respects.

(2) *When it is recognised by the Sovereign.*—This means that custom becomes customary law, when the sovereign in-

pliedly recognises custom and confers the force of law upon it. When custom is expressly recognized by the sovereign, it becomes, not customary, but written law. So, recognition in this case must be an implied one; but being an implied one, it is not always easy to determine when recognition has been given. This is the drawback of the theory under consideration.

(3) *When it has long continued in practice.*—According to this theory, custom becomes customary law when it has been long in vogue. But it may be asked, how long it is necessary for custom to have continued in practice in order for it to be considered as customary law? Besides, it is not easy to determine at what time the given custom first originated. All this difficulty makes the view far from being sound.

(4) *When it is recognised by a Court.*—According to this, when an action has been brought by one person against another in regard to a certain custom, and the Court has recognized it as law, it then acquires the effect of law. Many English jurists are of this opinion. But to allow such a thing to be done would be tantamount to investing judges with legislative power, and it is to be apprehended that this might sometimes result in their making law of what really is not even custom.

(5) *When certain conditions are fulfilled.*—According to this theory, the conditions on which custom becomes customary law are to be legally determined; and a custom is to become law, when it fulfils such conditions. The drawback of this theory is that the conditions in question are differently fixed in different ages, in different countries, and by different persons. In England, they are fixed as follows:—

1. That it is of immemorial antiquity;
2. That it has been continuous;
3. That there is neither doubt nor dispute about the fact of its being in practice;
4. That it is definite;
5. That it has obligatory force;
6. That it is reasonable;

7. That it does not conflict with law or other customary law.

In England, however, these conditions have not been fixed by law but by precedent. According to Dernburg, the German jurist, the conditions should be as follows :—

1. That it is to be the same act ;
2. That it must be a custom of many years' standing ;
3. That it must be a legal custom ;
4. That it does not matter whether it be a custom among individuals or among associations of individuals ;
5. That it is not contrary to good manners and customs and sound reason.

In ancient times, customary law was considered to be as complete and effective as written law, so that written law could be altered by customary law. But in modern times, it is generally held that written law cannot be altered or repealed by customary law, because written law has been made by the State in order to determine the rights and duties of individuals, while customary law derives its force from the opinion of the judge ; and it is to be apprehended that should alteration or repeal of written law by customary law be permitted, the rights and duties of individuals might be entirely at the mercy of the judge (in reference *vide* Section 2 of the preceding Chapter).

The next question which presents itself in this connection is whether the judge is bound to be acquainted with customary law ? The judge is, of course, bound to be acquainted with the law of his country. Is he, then, bound to be acquainted with customary law also ? Puchta says : "The judge is bound to have a knowledge of the law. Customary law, too, is law. Therefore, the judge must investigate customary law, when it is not clear in connection with the trial of cases." Art. 265 of the German Code of Civil Procedure, however, embodies an opposite opinion, for it provides that the judge is *entitled* to investigate customary law *ex officio* ; but if he is not acquainted with the customary law, the party concerned is then bound to prove it. Of course, it is entirely at the option of the judge whether

he will accept as customary law what is alleged by the party to be such. It would appear that the opinion of Puchta is eminently reasonable, and that whereas customary law is likewise "law," it is incumbent on the judge to be acquainted with it quite as much as with written law. In view of the provisions of Art. 2 of the Japanese *Law Concerning the Application of Laws in General* (which run to the effect that customs which are not contrary to public order or to good morals have the same force as law in so far as they are recognized by the provisions of laws and ordinances, or relate to matters which are not provided for by laws or ordinances), it is clear that there are customs which have the same effect as law—in short, virtually are law; and it follows, as a matter of course, that it is necessary for the judge to possess a knowledge of such customs. In the present state of things in Japan, it is clear that custom cannot supersede written law; and there is absolutely no room for the question of whether customs can alter or repeal laws in the narrower sense—that is, laws which have been made with the approval of the Diet.

SECTION 2.

THEORIES.

"Theories" (*gakusetsu*) are the opinions of jurists on points of law. For the purpose of pointing out that there are unlawful provisions in the law, or of discussing the advantages and disadvantages of a given law, there are many cases where jurists give expression to their opinion and assist in remedying the defects in the law or in its interpretation. It is in this manner that theories become a source of law. The state or legislators employ the opinions of jurists merely for their guidance. It is not that theories as such become law. In order that theories may acquire the force of law, it is always essential that such force should be conferred on them by the power of the state.

Theories may become a source of law either directly or indirectly. For example, Theodosius II. of Rome gave the force of law to the theories of Papinianus, Paulus, Gaius, Ulpianus and Modestinus—the great legal authorities of his day, while Justinian collected the opinions of thirty-nine great lawyers into the Digest and gave them the force of law—cases where theories were a direct source of law. In modern times, however, there does not seem to have been a single instance in which the theories of jurists have been directly turned into law : it has always been indirectly that they have become a source of law. They serve as a guidance for the benefit of legislators, as they always did and will do.

SECTION 3.

REASON.

"Reason" (*jöri*), that is, the nature of things, is a term which is equivalent to "righteousness" or "justice." As already mentioned, the "*Rules for the Conduct of Judicial Affairs* (1875) contained a provision to the effect that customs should be followed when there was no written law ; or reason, if there was no custom. In the laws of certain countries, it is provided that where there is no express provision of the law, natural law shall be followed. Natural law in this connection denotes the same thing as reason.

Though reason or natural law is an exceedingly indefinite and vague thing, it has been found necessary that there should be some such provision as mentioned above, because the judge would otherwise be obliged to refuse to render a judgment on the ground that there was no express provision on which he could act. So far, we have dwelt on how necessary it is for the judge to conform to reason in matters relative to which neither express provisions nor custom exist. It goes almost without saying that in making law, too, it is essential to follow the guidance of reason above everything else.

SECTION 4.

TREATIES.

A treaty (*jōyaku*) is a written contract between one state and another ; but when one country concludes a treaty with another, it is not incumbent on her people forthwith to obey the terms of such treaty. A treaty being a contract between states, only the contracting powers themselves are bound by it ; but should the people of the contracting powers fail to conform to the terms of the treaty, because it is binding on the states only, it would be impossible for such powers to perform their contractual obligations. For this reason, when a state concludes a treaty with another, such state promulgates it within the borders of her territories. It is quite indifferent whether it is promulgated as a law or ordinance or as a treaty : this is a matter to be decided according to the formal principles adopted by the municipal law of each country. But when a treaty is once promulgated in the appointed form, the people are then bound to conform to its terms. In this case, however, they are not bound directly by the engagement existing between their country and the other contracting state, but by a law which has been derived from another source of law—namely, treaty.

SECTION 5.

JUDICIAL PRECEDENTS.

A "judicial precedent" (*hanketsu-rei*) is a judgment which the judge has, in a certain case, pronounced *vis-à-vis* the parties concerned. Though, in rendering judgments, the judge is always bound to act according to the law, yet when there is no express legal provision bearing on the question, he must adjudicate upon the case according to custom or reason. Society progresses, and laws which are fixed once for all like those of the "Medes and the Persians" are often found inadequate to meet the requirements of the ever changing state of affairs. Moreover, no law is absolutely perfect and free from defect. Though nowa-

days, in most countries, elaborate codes of law are prepared and minute provisions made governing rights and duties, yet defects and flaws creep in which are taken advantage of by the cunning for the purpose of committing improper acts, or which leave people in a quandary as to how to act. It is thus that a collection of judgments rendered by the court in regard to matters as to which there are no express provisions in law—that is, judicial precedents—become a source of law to be made later on.

Though law is binding on the judge, yet judicial precedents do not bind the judge in Japan. In most cases, the Japanese judge conforms to precedents; but when precedents are contrary to principles of law or reason, it is not necessary that they should be followed. The judge is not bound by precedents not only when such precedents have been given by courts of a lower or the same grade, but even when they have been given by superior courts; subject only to the limitation that the doctrine laid down by the Supreme Court on a point of law in a judgment in a given case binds the courts of lower grades in all matters relating to that special case (in reference *vide* "Judicial Interpretation" in Chapter 8). In England and America, a principle diametrically opposite to the above is acted upon, the judge being bound by precedents, and inferior courts must act on precedents furnished by superior courts. It is highly desirable that there should be uniformity in judgments, because if the courts of one and the same country render different judgments in cases of the same nature, it is sure to have the effect of hindering the uniform exercise of the judicial power of the State, undermining the authority of the courts and the judges, and rendering the rights and property of individuals insecure.

SECTION 6.

RELIGION.

In days when the duties of worship and government were committed to the same hands, religion (*shūkyō*) was regarded as

the same thing as government (*seiji*), and it was also regarded in the same light as law, because the belief obtained that law was derived from the will of God. In those days, the State was governed by religion ; and religion was, as a matter of course, the source of law, as the Code of Lycurgus in Greece, the law of Moharet in Arabia, the Institutes of Manu in India, the law of Moses in Judea. Though, in recent times, religion seldom affords a source of law, yet there are traces of the old usage of law being derived from religion. For example, the reason why divorce was forbidden in France up to 1885, and is forbidden in Spain and Portugal, etc. even now, is partly (at least) to be found in the consideration that persons who have been joined together by God ought not to be put asunder by man. The system governing the succession to the headship of a house in Japan is partly founded on the religious consideration that it is necessary to perpetuate services for the benefit of the departed souls of one's ancestors.

SECTION 7.

FOREIGN LAW.

It is in the case of inherited (adopted) law that foreign law becomes a source of law to a country. A foreign law does not forthwith become the law of a country. No country is bound to follow the law of another state. Foreign law becomes the law of a state when the latter, with the intention of following the example of such law, bestows the force of law on provisions which are similar to, or the same as, such foreign law. In these days, when foreign intercourse is so frequent, there are many cases where foreign law becomes a source of native law. (In reference *vide* " Indigenous and Inherited (adopted) Laws " in the preceding Chapter.)

CHAPTER 11.

PROMULGATION AND ENFORCEMENT OF LAWS.

In Japan, law takes effect as such when it is sanctioned by the Emperor. The promulgation of a law merely serves to show the time from which it is incumbent upon the nation to observe it, or on the public officials to enforce it. The German Constitution acts on an entirely different principle, for Art. 2 of the same provides that laws acquire binding force by promulgation. When Ihering says that laws take effect as such by promulgation, therefore, he expresses his view of the matter under the German Constitution : it cannot be regarded as a principle applicable to the laws of all countries. In England, it is held that law acquires executory force without being promulgated—a rule which also differs from the provisions of the Japanese Constitution.

Laws are promulgated by the organs of state by orders from the Emperor, as is clearly provided in Art. 6 of the *Constitution* which runs : “ *The Emperor gives sanction to laws and orders them to be promulgated and executed.* ” As to the question of from what time a law which has been thus promulgated comes into force, this is provided in Art. 1 of the *Law Concerning the Application of Laws in General* : —

“ *A law comes into force after the lapse of full twenty days computed from the day of its promulgation, except when the time for its enforcement is differently provided by law.* ”

“ *As regards Formosa, Hokkaidō, Okinawa Prefecture and other insular districts, a special date for the enforcement of a law may be fixed by Imperial Ordinance.* ”

Though, according to the foregoing provisions, a law is, as a rule, enforced upon the lapse of twenty days from the date of

its promulgation, there are laws which are exceptionally enforced from the very day of promulgation or a certain further period after the lapse of twenty days from the date of promulgation (as the present *Civil* and *Criminal Codes*). Laws and ordinances applicable to Korea and Kwantung are enforced after the lapse of seven days calculated from the day on which they reach the Government offices there (*Imperial Ordinance No. 11* of the year 1907). Imperial House Ordinances, Imperial Ordinances, Cabinet Ordinances, and Departmental Ordinances are also enforced after the lapse of twenty days from the day of promulgation except when the time for their enforcement is differently provided (*Ordinance Concerning Forms of Promulgation*, Art. 11).

As to the question of the language in which laws are to be promulgated, this is a matter which is differently provided for in different countries. In Japan, they are promulgated in the ordinary Japanese style—a style in which Chinese characters are mixed up with *kana* (*kanamajiri-bun*); but in Formosa, a Formosan version is given along with the Japanese. In some foreign countries, however, laws are frequently promulgated in different languages, because different languages are employed in different parts of the country. In Switzerland, where there is no “national language,” for example, laws are promulgated in three different languages—namely, German, French and Italian. In Austria, German and Hungarian are employed; and in Belgium the French language is employed for the purpose. The language employed in promulgating laws may even differ from that employed in Court. In Japan, the Japanese language is the only language which can be employed in Court.

Ignorance of the law cannot be invoked as a defence for a contravention of law (*Ignorantia legis neminem excusat*), because it is impossible to prove that a person has, or has not, obtained knowledge of a given promulgated law. In Japan, laws are simply promulgated. In France and Belgium, however, a clear distinction seems to be drawn between the “promulgation”

and the "publication" of a law. The *promulgation* of a law is an act (1) by which the existence of such law is made clear and (2) by which it is ordered to be enforced; while the *publication* of a law is an act by which such law is made known to the people. In this way, the time when a law acquires *executory* force is distinguished from the time when it becomes binding upon the nation. But such distinction is not adopted by a majority of states, because it is productive of no practical advantage.

Though, at the present day, laws are all promulgated, such was not invariably the case in all ages and in all countries. In Greece, law was promulgated for the first time in the days of Dionysius. In Rome, it was from the Twelve Tables onwards that law was promulgated. In Japan, neither Shōtoku Taishi's so-called "Constitution" nor the "Hundred Articles" (*Hyak-kajō*) of the Tokugawas were promulgated. At the end of the "Hundred Articles," it was written: "*The above have been fixed with the approval of the Lord and it is hereby ordained that they shall be shown to none but the officials concerned.*" The chief reason why laws were not promulgated in ancient times was perhaps that there was a great difference in point of knowledge between the lawmaker and the people; and it was impossible for the people to understand the law, even though promulgated. Even when the rank and file of the people increased in knowledge, the authorities were so much under the influence of long established usage that they thought it advisable, or convenient, not to promulgate the laws. In this way, laws were, then, nothing more than instructions issued *vis-à-vis* public officials, and it was thought that to keep laws un promulgated was convenient for the discretionary enforcement of the same. But as civilization progressed, people demanded the promulgation of laws by the state, because, without full knowledge of their provisions, it was impossible for them (the people) to ascertain their rights and duties. The Twelve Tables of Rome, for example, were promulgated by the sovereign in compliance with

the demand of the populace. When laws were not promulgated, not only were the rights and duties of individuals insecure, but there was a serious danger of power being grossly abused by the authorities ; and it also tended to render the people servile, to the obstruction of the progress of the nation.

Though, in former days, laws were not, as a rule, promulgated, yet some of them were exceptionally promulgated, when it was thought advisable to do so. Thus, under the Tokugawa régime, some laws were posted up on boards known as "*Kō-satsu*" (high placards), or were announced from place to place by criers under the name of "*O Fure*" (august notifications).

The manner in which laws are promulgated varies from age to age and from country to country. The various methods of promulgation which have been in use so far may be summarized as follows :—

(1) *Oral pronouncement*.—When the knowledge of the people was still undeveloped, and they were unable to understand laws made by the legislator, it was the usual practice to assemble the people and acquaint them with the contents of laws by reading them out aloud to them. And in order that laws thus read out might be more easily committed to memory, they were sometimes put into rhymes—as in India and Siam. The pronouncement of laws was usually effected at places where as many people as possible were assembled, such as temples, shrines, markets, theatres, ports, harbours, etc. In other cases, a large number of persons were assembled by means of musical instruments, and the text of laws was read out aloud to them, as was the case with the *Taihō* laws of Japan (to which previous reference has been made) and with those under the [first French Republic].

2. *Registration*.—According to this method, documents containing the text of laws were kept at certain places, where the public were at liberty to come and see them—a method which became practicable only when most people had attained to such a stage of education as enabled them to read writings.

But this was a very awkward method, because people could not obtain a knowledge of the law unless they went to certain places where the documents containing them were kept; nor was it a method well calculated to inform the general public of the contents of statutes.

3. *Posting up.*—This was done by posting up the text of laws at certain places ; and its especial use is sometimes seen in connection with certain particular matters in certain particular cases, as the notice "*No shooting*" at places where shooting is forbidden, or, "*No thoroughfare*" at places where persons are forbidden to pass. In Japan, the system of posting up laws in general was abolished in 1874 ; but the practice of publishing law in this manner still remains to a large extent, so far as certain particular matters and places are concerned, as illustrated by the examples given above.

4. *Circularizing.*—According to this method, a copy of the law was circulated from house to house within each town or village, etc. But this process entailed a great waste of time and trouble.

5. *Distribution.*—This method consisted in distributing to houses copies of a law which have been prepared by copying or printing. But we have never heard of an instance of this method having been employed so completely as to serve a copy on each household throughout the country, the usual practice being to distribute only a certain number of copies. According to the English Law of Promulgation of 1807, 5,500 printed copies were distributed in case of general laws and 3,000 copies in case of special laws.

6. *Publication in the Official Gazette.*—According to this method, laws are promulgated by publishing them in the Official Gazette, which is issued by the Government. This is the method which is now employed in Japan in accordance with Art. 12 of the *Law Concerning Forms of Promulgation* (Imperial Ordinance No. 6 of 1907.) Though even by this method the whole nation cannot be expected to be brought into touch with laws as a

matter of fact, yet it is adopted in most countries because it is more satisfactory than any other method. But in course of time it may perhaps be practicable for the State to distribute the Official Gazette to each house, and so give facilities for all the people to become acquainted with the law. In Formosa, it is provided by Formosan Government Ordinance No. 103 of the year 1901 that ordinances specially issued by the Governor-General of Formosa are to be promulgated by publishing them in the (Formosan) Government Gazette attached to the *Taiwan Nichi-Nichi Shimpō*. In this connection, the Government Gazette is to be regarded in the same light as the Official Gazette. The ordinances of the Governments of Korea and Kwantung are published in their respective Gazettes.

CHAPTER 12.

LEGAL SANCTIONS.

"Legal sanction" (*hōritsu no seisai*) is retribution inflicted by law. Rewards given by law are not said to be legal sanctions. Even should a prize be awarded for the performance of a certain act, it would not be a legal sanction. It is in order to insure the enforcement of law and so to maintain the order of the State, that the law imposes a sanction for certain acts; but it is a mistake to jump to the conclusion that law operates simply owing to the sanction which is thereby imposed. Persons may, with impunity, contrive to evade the provisions of laws which contain penal provisions, while at the same time there are other laws which do not contain penal provisions, but by conforming to which persons may insure their own safety. Though legal sanctions vary in different ages and countries, those which now generally obtain may be classified into (1) sanctions under public law and (2) sanctions under private law. Sanctions under public law are mostly criminal sanctions; while the greater part of the sanctions under private law are civil sanctions.

SECTION I.

SANCTIONS UNDER PUBLIC LAW.

Sanctions under public law (*kōhō-jō no-seisai*) are penalties which are imposed, upon the demand of an organ of the State, on persons who have contravened the law.

1. *Sanction under criminal law :—*

(1) *Death (shikei).*—The penalty of death is inflicted, not for the purpose of causing pain, but for the purpose of putting an end to life. It is inflicted neither by way of chastisement nor with a view to the reformation of the condemned, but simply for permanently expelling from society, and insuring society against danger from, those who are menaces to it. The penalty is now effected in one of the following four ways only—namely: (1) hanging, (2) beheading, (3) shooting and (4) electrocution. In former days, other means, such as crucifixion, burning, sawing, quartering, etc., were also employed; but these have all been discarded, as they involve unnecessary cruelty. In former days, again, the heads or bodies of executed criminals used to be exposed to the public gaze; but this, too, has been abolished in all civilized countries, as it is unnecessary to inflict insult upon the dead, and exhibitions such as these tend to brutalize the public.

In some countries (as certain cantons in Switzerland), capital punishment has been abolished. Various reasons are advanced for this measure. It is said that life having been bestowed on man by the Almighty, it is not proper for men to deprive their fellows of life, and that there are ways in which persons can be isolated from society otherwise than by execution: it is enough

to intern them for life, and there is no reason why they should be put to death. Against this, however, it is argued that persons intended to be shut up in prison for life, instead of being put to death, may effect their escape, and that to support such criminals for life at the charge of the State would mean to throw so much additional weight on the shoulders of good citizens who are already far too heavily burdened with the support of ordinary prisoners. As a matter of practice, the penalty is retained in most countries and abolished only in a few. As a legislative question, however, the matter is far from being finally disposed of: on the contrary, there is still room for inquiry, because even a person who (legally speaking) should have been put to death may afterwards repent and amend himself to such an extent as not only not to cause any further trouble to society but positively to prove himself a public benefactor. It would seem that capital punishment would be better abolished than retained for three reasons. In the first place it is merely vindictive and not deterrent; in the second place, being irrevocable, it is too extreme a measure, because in case of a mistaken sentence being carried into effect, the mistake cannot be rectified; and in the third place the state should not legalize a cold-blooded murder, under the plea of "justice," at the hands of its officers.

- (2) *Corporal penalties (taikei).*—Corporal penalties are penalties by which pain is inflicted on the bodies of criminals, such as whipping (for example) which is still practised in some countries—including Formosa (where the penalty is—albeit very unjustly—inflicted on natives only for certain

offences committed by them). Corporal penalties are inflicted for the purpose of correcting criminals by giving them pain or of making public examples of them in order to warn others against acting after their example, as was the case with the ancient penalty of cutting off the nose or ears.

There were other penalties which were inflicted not so much for the purpose of causing physical pain as for the purpose of marking condemned persons as such. The penalty of tattooing, for example, and that of cutting the hair of the head in a peculiar manner, were inflicted in order to mark how the party had been condemned for a crime, and where he had been condemned, so as to cause the public to take warning from such a party, though no doubt they were originally inflicted by way of retributive punishment for pains which a person had caused to another. Nowadays, however, most jurists condemn this kind of penalty; and in fact, too, there is no civilized country where such penalty is retained because it is apprehended that the infliction of such punishment would tend to drive ex-convicts into despair owing to their inability, in consequence, to pursue a regular and honest course of life.

- (3) *Penalties against liberty (jiyu-kei).*—These are penalties by which personal liberty is limited. They may at the same time cause physical pain to condemned persons; but they are not imposed with the primary object of inflicting such pain, but chiefly for the purpose of restraining personal liberty and preventing the prisoners from causing harm to society; and also for making them feel mental pain. The kinds of penalties against

liberty vary from country to country ; but the following are those imposed under the present Japanese *Criminal Code* :—

a. *Penal servitude* (*chōeki*) by which persons are confined in prison and subjected to forced labour. Penal servitude may be either perpetual or for a limited period varying from one month to fifteen years.

b. *Imprisonment* (*kinkō*) by which persons are simply shut up in prison and are not subjected to forced labour. Like penal servitude, imprisonment may be either perpetual or for a limited period varying from one month to fifteen years.

The term of both penal servitude and imprisonment may be augmented up to twenty years under aggravating circumstances, or reduced to less than one month under extenuating circumstances.

c. *Detention* (*kōryū*) by which persons are detained in a place of detention for a term of from one day to thirty days.

(4) *Penalties against property* (*saisan-kei*).—These are penalties by which the property of offenders is appropriated to the State. Confiscation (*bōshū*) of tools employed for the consummation of an offence, and confiscation of objects which have been acquired by an offence, or of legal contraband, are penalties against property just as much as fines (*bakkin*) and police fines (*kwaryō*). In ancient times, there was a system of atonement under which persons condemned to death, corporal penalties, etc. were relieved of such penalties in consideration of monetary payments, but no such system is now adopted. It is held by some jurists that penalties against property

cannot be regarded as entirely fair, as they are felt more or less severely by different persons according to their means : but neither corporal penalties against liberty are fair penalties for that matter. A fine varies from twenty yen upwards, while a police fine varies from ten sen up to twenty yen. A person who is unable to pay a fine is detained in a labour house for a term of from one day to one year ; and a person who is unable to pay a police fine, for a term of from one day to thirty days.

(5) *Penalties against honour (meiyo-kei).*—These are of two kinds : one consists in suspending a person from a certain honour (as suspending persons from the enjoyment of electoral and eligible rights) ; and the other consists in depriving persons of a certain honour altogether (as disqualifying persons for holding public offices or depriving persons of their official position and orders of merit (decorations).

2. Sanctions under administrative law :—

- (1) *Compulsion against persons* ;
- (2) *Compulsion against things* (as, for example, selling at public auction, under the *Law for the Collection of National Taxes*, property of persons who have failed to pay a tax) ;
- (3) *Non-Criminal fine* (in reference *vide* the *Law Concerning Administrative Execution*, Art. 5) ;
- (4) *Annulment* (as when a superior administrative office annuls the orders of an inferior one) ;
- (5) *Suspension and prohibition* (as suspending or forbidding the carrying on of a business) ;
- (6) *Dismissal* (applying to public officials) ;
- (7) *Deduction from a salary* (by way of disciplinary punishment) ;

- (8) *Reprimand (kenseki)*;
- (9) *Suspension from office and dismissal from office*
(applying to notaries, and headmasters and teachers
of primary schools).

SECTION 2.

SANCTIONS UNDER PRIVATE LAW.

Sanctions under private law (*shihō-jō no seisai*) are penalties which are, on the demand of private individuals, inflicted by the State upon persons who have contravened the law.

1. *Compensation for damages (songai-baishō)*.—This means to pay a fixed amount of compensation for damage done by an unlawful act. Compensation is paid sometimes in money and sometimes in kind—in short, it means anything which the aggressor delivers to the injured party in accordance with a judgment pronounced against him. But compensation is not a fine, for a fine is a sanction under criminal law. The amount of damage is fixed beforehand in some cases (as damage to property), and in some cases (as damage to reputation) it is not.

It is held by the French school of jurists that it is wrong to require monetary compensation to be paid for such damage as damage to reputation (as by libel), damage caused by obstructing the conclusion of an adoption, or physical damage—in short, damage which really cannot be estimated in money; while the English school of jurists is of opinion that, even for damage which cannot be estimated in money, monetary compensation may be required to be paid. The Japanese *Civil Code* (Art. 710) provides that compensation must be paid even for damage other than that to property. In case a person has been killed, he or she cannot, of course, claim compensation in his or her own person; but his or her father, mother, spouse (wife or husband) and children may claim compensation for damage, no matter whether such damage is pecuniary or otherwise (*Civil Code*, Art. 711). Another point which requires consideration in

this connection is the validity of what is called a "penalty for non-performance clause" (*kwatai-yakkan*), by which the amount payable by way of damage in case of non-performance is fixed in advance by the parties to a contract. There is a dispute as to whether in such case the judge may order compensation to be paid in excess of the amount thus agreed upon between the parties. It would seem, however, that, in regard to an act under private law, it is not proper for the judge to order payment of damages in excess of those which have been determined by the mutual agreement of the parties.

2. *Restoration to right* (rehabilitation).—Rehabilitation (*fukken*) denotes the act of restoring the person entitled to the exercise of a right from which he has been debarred by a person not entitled to do so, as restoration to the owner of goods of which he has been robbed by a thief, restoration of unjust enrichment, or "revivor" (*genjō-kwaisoku*).

3. *Direct performance*.—This is where the person bound is caused to perform the duty which he has promised to perform instead of paying compensation for damage. Direct performance is usually required in connection with a contract, against the non-performance of which full remedy cannot be obtained by means of compensation for damage. In case, for example, an actor having undertaken to perform in a play has failed to do so, or a painter has omitted to paint a picture notwithstanding his promise to do so, the evil is not of such a nature as can be remedied by means of money. Hence the defaulter is required directly to perform what he has undertaken. But it is to be noted that even direct performance is not always calculated to give full satisfaction to the person entitled, because the actor or painter (in the case of the above example) may very likely not put his whole heart and soul into his forced labour.

4. *Suspension and abandonment of an act and causing an act to be done*.—Suspension of an act is decreed in order to stop the continuation of an improper act, as, for example, to cause the construction of a chimney half-built to be stopped, or to leave

off-work which is going on for drawing water from a well or spring in the adjacent premises ; while to have an act abandoned is to cause an improper act to be entirely undone—as, for example, to cause a chimney already finished to be removed. To cause an act to be done is, for example, to cause an apologetic advertisement to be inserted in newspapers. An act in this connection may mean a negative act (omission) as well as a positive act. So, to cause a certain trader not to deal in certain commodities, or to require a certain public performer to abstain from exhibiting certain performances, is also to cause an act to be done.

5. *Voidness*.—This is where a certain act is prevented from taking any legal effect whatever—that is, the formation and existence of an act is not legally recognized, such being the case with an agreement to do an act forbidden by law. Thus, a monetary claim arising from gambling, a marriage entered into by intimidating the other party, etc. are regarded as void.

6. *Annulment*.—By annulment, a certain act loses its effect for the future, when it is annulled by the person entitled to the right of annulment. As to who has the right of annulment in regard to a certain act, this is a matter which is provided for in regard to specific acts. An annulled act becomes void *only for the future*, so that all acts done on the basis of the act in question between the time when it was done and effected and the time when it was annulled are valid as a matter of course. A marriage, for example, effected without the consent of the father and mother becomes void only when it is annulled by the parents.

7. *Deprivation of personality*.—Natural persons are never deprived of their personality at present. Deprivation of personality is, therefore, a penalty inflicted upon *juridical persons* only by ordering them to dissolve.

8. *Deprivation of rights under the family law*.—This is, for example, to deprive a person of parental power (*Civil Code*, Art. 896) or of the right of succession (*ditto*, Arts. 969 and 997).

CHAPTER 13.

ALTERATION AND REPEAL OF LAWS.

To alter (*henkō*) a law means to cause such law to lose its effect and to enact and promulgate another in its place, while to repeal (*haishi*) a law means to simply cause such law to lose its effect without enacting and promulgating another to take its place. In this light, the alteration of a law may also be regarded as the repeal of a law in a narrow sense.

Some laws have a period fixed for their duration, while others have not. The former are terminated by operation of law upon the expiration of the stated period, while the latter continue in force so long as the State does not express an intention to repeal them. A provision to the effect—for example—that the land tax shall be levied at an increased rate for five years from the date of enforcement is a law which has a fixed period of duration. On the contrary, the *Constitution*, the *Civil Code*, and other general laws, have, as a rule, no fixed period for their duration. Laws are repealed as a matter of course when the State expresses an intention to repeal them (repeal by the will of the State). But there are also cases where a law is terminated irrespective of the will of the State (repeal independent of the will of the State). For example, laws which operate in Hokkaidō only would lose their effect should the island be submerged in the sea in consequence of an earthquake. In the same way, laws relating to neutrality cease to be effective *ipso facto* when the war between the foreign powers concerned is at an end.

There are two ways in which laws are repealed—namely, (1) express repeal and (2) implied repeal. A law is expressly repealed when the State expressly proclaims its repeal; while a law is impliedly repealed, when, though the State does not formally express an intention to repeal it, it promulgates a new law the provisions of which are incompatible with the other

older law. When the new law only conflicts in part with the old, such part of the old law only is repealed; but when one conflicts with the other *in toto*, the old law is wholly repealed. In case, for example, there has been in force a law by which foreigners were debarred from owning land, and a new law is promulgated granting them the enjoyment of the right in question while the old law is not formally repealed, the latter is said to be "impliedly" repealed. This fact is embodied in the maxim: "*A new (or later) law supersedes an old (or earlier) one.*"*

Another principle governing the alteration and repeal of laws is that in order to alter or repeal an earlier provision by means of a later one, the latter must be of the same, or greater, effect than the former. For example, laws can (as a rule) be altered or repealed only by laws; and Imperial Ordinances can be altered or repealed only by Imperial Ordinances, or laws or the *Constitution*, which are more effective than Imperial Ordinances.

CHAPTER 14.

EFFECT OF LAW.

The effect of law is three-fold—namely, (1) in regard to time, (2) in regard to place, and (3) in regard to persons, things and matters.

SECTION I.

EFFECT OF LAW IN REGARD TO TIME.

The effect of a law in regard to time is determined by the questions, (1) when it takes effect and (2) how long it continues in force. The former of these two questions has been discussed in Chapter 11 dealing with the promulgation and time for enforcement of a law, while the latter has been discussed in the preceding Chapter dealing with the alteration and repeal of laws.

* *Lex posterior derogat priori.*

The only point which remains to be discussed in this connection, therefore, is the question, whether a law has a retroactive effect or not. That "the law has no retrospective force"** has been a rule ever since the day of Roman law; but this rule has not been one concerning legislation, but relative to the application of law. In other words, the rule does not forbid the enactment of a law possessing retrospective force, but provides that a law shall not be applied to facts which have occurred previous to the enactment of such law. There were, however, times when this rule was considered as binding also on the legislator—that is, it was held that the State was not authorized to make laws possessing retrospective force. According to Constans of France, laws which are retrospective cannot be deemed to be laws, because laws which are retrospective are all atrocious tyrannies. But laws which are retrospective are not all tyrannies, as they may be enacted for the purpose of lightening the burden of the people, lessening penalties for crimes, or supplying defects in older laws. Nor does it hold good to say that laws are not laws simply because they are tyrannical.

When a retroactive law has been promulgated, the judge has no authority to refuse to apply such law. For example, on the 20th April of the 2nd year of the French Republic, a law was issued by which the same rights and privileges as were enjoyed by legitimate children were bestowed on natural children, and it was further provided that the said law should apply to all natural children born subsequent to the 14th April of the 1st year of the Republic. When it is thus expressly provided in a law that it shall have retroactive effect, and such law has been made in the lawful exercise of the power of the State, it is not reasonable to consider it as void, nor is it legal for judges or administrative officials to refuse to apply or enforce such law.

On the other hand, there are laws which cannot achieve the object with which they have been made unless they are

* *Leges et constitutiones futuris certum est dare formam negotii, non ad facta praeterita revocari.*

recognized to possess retrospective effect, even though it is not expressly provided that they shall have such effect. A law, for example, forbidding the slave trade implies not only that it is forbidden to make slaves of men, but also that slaves already in existence are to be emancipated—that is, the law is to be of retrospective effect to the extent that the men who were made slaves in the past are now to be set free. Moreover, a law is sometimes enacted for the interpretation of another law already in existence ; and such law would not be fully effective unless it possessed retroactive force.

For these reasons, the draftsmen of the German Civil Code have declared that it is unnecessary to provide a legal rule to the effect that laws shall have no retroactive force.

It is but proper that the new law should be applied to acts done when the new law is in force ; and the old law to acts done when the old law was in force ; but in case of acts commenced when the old law was in force and not finished before the new law came into force, considerable difficulty is involved in solving the question of whether the old or the new law should be applied to them. For the purpose of such acts, therefore, the legislator issues a transitional law such as the *Law Concerning the Application of the Civil Code* (Law No. 11 of the year 1898) or the *Law Concerning the Application of the Criminal Code* (Law No. 29 of the year 1908), or (as is more often the case) inserts transitional provisions in the new law. The provision in connection with the *Criminal Code* which determines which law is to be applied to persons who committed offences under the old law and have been arrested under the new law, or when offences coming to light at the time when the old law was in force are to be adjudicated upon at the time when the new law is in force, and the provision in connection with the *Civil Code* which determines which law governs when the provisions of the new law differ from those of the old in regard to prescription (*jikō*) under the *Civil Code*, are examples of provisions covering transition periods.

SECTION 2.

EFFECT OF LAW IN REGARD TO PERSONS, THINGS AND PLACE.

In ancient times, what is called the "personal principle" (*sokujin-shugi*) obtained—a principle according to which the domestic law extended neither to foreigners in a foreign country nor to those resident in the country—in other words, the law of a country followed the people of that country even to a foreign country where, therefore, they were not bound to act under the law of that foreign country. This principle was recognized in the laws of Judea, Arabia, Turkey and Rome in ancient times. In the Middle Ages, however, exceptions were recognized to the rule by domestic law or by treaty; but the rule still obtained that foreigners who came into a country were not entitled to any rights under the domestic law of such country. The drawback of the "personal principle" was that when a native of one country was in another country, he might disturb the peace and order of the latter country without fear of being punished under the domestic law of the country, and that a native of one country might borrow money in another from a native thereof and omit to repay it without being punished by the law of the creditor's state. The "territorial principle" (*sokuchi-shugi*) then came into favour—a principle according to which persons and things, whether native or foreign, or whether owned by natives or foreigners, were all to be governed by the law of the country where they actually lived or existed. Thus, even foreigners were bound to follow the domestic law of the state in which they lived, but as soon as they left it, they were no longer under any obligation to follow such domestic law. The "territorial principle" came into vogue (1) because, as the result of the feudal system, the connection between land and men became more intimate than ever, and (2) because the people of various countries ceased to roam about from place to place and became fixed to certain places; and, owing to the importance which thus came to be attached to land, the relations between the ruler and

the ruled were founded on the basis of a certain territory. As the result of the adoption of the "territorial principle," the following were subjected to the power of a state ;—

- (1) All the people of the particular country resident within its territory ;
- (2) All foreigners within the territory of the State ;
- (3) All things within the territory of the State irrespective of whether they belonged to native or foreigners.

As we have already seen, the absolute "personal principle" is subject to the drawback that a state cannot deal with foreigners who have committed offences within its territory, while the absolute "territorial principle" is open to the objection that due regard is not paid by it to the characteristic features of foreigners which have been developed out of the local conditions and manners and customs of their respective home countries. If, for example, a native of one country who has capacity for marriage according to the law of his country—which is founded on the temperature, manners and customs, etc. of that country—was to be prevented from getting married because of his residence in another country, according to the law of which he is not yet of a marriageable age, it would have the result of preventing a person from getting married, notwithstanding that he is really of a mature age for the act. For this reason, the "territorial principle" is, in modern times, chiefly acted upon, but tempered with an admixture of the "personal principle." In other words, the law of all countries at the present day is based on a mixture of the "territorial" and "personal" principles, the chief ingredient of which is the "territorial principle." The Japanese *Criminal Code*, for example, provides for the punishment of foreigners as well as Japanese subjects for certain offences committed abroad as well as in the country (in reference *vide Criminal Code*, Arts. 1, 2 and 3).

Under laws based on the mixed "territorial" and "personal" principles, the "personal principle" is followed in some

respects, the more important of which will be considered under the following heads—namely, (1) extraterritoriality, (2) consular jurisdiction, (3) capacity, (4) relationships, and rights and duties based on relationship, (5) succession and wills, and (6) matters relating to the special quality of a nation; while the “territorial principle” is followed in other respects, the more important of which will be considered under the following heads—namely, (1) real rights in movables and immovables, (2) contracts, (3) penal law, (4) forms of juristic acts and (5) nationality.

(1) *Extraterritoriality (chigwai-hōken).*—Extraterritoriality forms an exception to the “territorial principle.” Persons or things belonging to a country which enjoys the right of extraterritorial jurisdiction in another are not governed by the law of the latter country, even when they are in that country. The sovereign or president, ministers, men-of-war, and the troops of a country being all representatives, political or military, of that country, they cannot be subjected to the sovereignty of a foreign country in which they may happen to be resident, without being debarred from fully and safely doing acts as representatives of their own country. Hence the recognition of this exception to the territorial principle.

(2) *Consular jurisdiction (ryōji-saiban-ken).*—This means that, by treaty, or (rarely) by custom, people of one country do not submit to the jurisdiction of the law courts of another country in which they are resident, but are placed under the jurisdiction of consuls who are sent from their home country to the other country. As the European powers held this right in Japan from the 5th year of Ansei (1858) to July of the 32nd year of Meiji (1899), so Japan enjoys the same in China and Siam now. Like extraterritoriality, this, too, constitutes an exception to the “territorial principle.”

(3) *Capacity (nōryōku).*—When a native of one country resides in another country, his capacity is, as a rule, determined according to the law of his home country. “Capacity” denotes the legal qualification for the enjoyment, or for the exercise, of

rights. As it is commonly used, however, the word means the latter only—that is, the legal qualification for the exercise of rights ; and it is also called “ capacity of action ” (*kōi-nōryoku*). The capacity of a person is developed and determined by the temperature, manners and customs, and other local conditions of his home country. According to the Japanese law, for instance, majority is fixed at full twenty years of age, so, even when in a country where the age of majority is fixed at twenty-five years, a Japanese subject is to be regarded as of age, if he is at least twenty years old, even though he may be under twenty-five. The above remark applies not only to minors but also to married women, “ incompetent ” persons, etc. As regards capacity of right (*kenri-nōryoku*), however, the “ territorial principle ” is followed. For example, when a native of one country where slavery is recognized, and who is a slave under the law of his home country, goes to another country where slavery is not recognized, the latter country does not recognize him as a slave. It is with reference to capacity of action that Art. 3, par. 1 of the Japanese *Law Concerning the Application of Laws in General* provides that the capacity of a person is determined by the law of his home country.

(4) *Relationships and rights and duties based on relationship.*—These are also governed by the law of the home country of a given person, instead of being determined on the “ territorial principle.” To give a few examples :—

a. *Marriage (kon-in).*—The material conditions are determined by the law of their common home country in the case of a couple of the same nationality, and by the law of the home country of each party in the case of a couple who are not of the same nationality. In case, for example, a Japanese subject is married in Italy to another Japanese subject, the Japanese law—not the Italian law—governs, while in case a Japanese male is married to a French female in Italy, the conditions of marriage must be fulfilled by the former according to the Japanese law and by the latter according to the French law.

(*Law Concerning the Application of Laws in General*, Art. 13). Divorce is governed by the law of the home country of the husband at the time of the occurrence of the fact forming its cause, because otherwise a husband who was desirous to effect a divorce might transfer his nationality to another country, the law of which was more convenient for his purpose. But no adjudication of divorce can be made in Japan, unless the fact asserted by the plaintiff as the ground of his claim constitutes a cause of divorce according to the Japanese law also (*ditto*, 16). As to the effect of a marriage, it is determined by the law of the home country of the husband (*ditto*, Art. 14).

b. *Parent and child (shin-shi)*.—Whether a child is legitimate or not is determined according to the law of the country to which the husband of its mother belonged at the time of its birth (*ditto*, Art. 17). An adoption is governed by the law of the parties concerned, when they are of the same nationality. In case it is concluded between persons who are not of the same nationality, the conditions for its formation are determined by the law of the home country of each party, that is, the conditions for being an adoptive parent are determined by the law of the home country of the would-be adopter, and the conditions for being an adopted child, by the law of the home country of the party about to be adopted (*ditto*, Art. 19). The legal relations between parent and child are determined by the law of the home country of the father, or, in case the father is non-existent, by the law of the home country of the mother (*ditto*, Art. 20).

c. *Duty of support (fuyō no gimu)*.—In case a dispute arises in a foreign country between persons of the same nationality in connection with the duty of support (of a relation), it is proper that it should be determined by the law of their home country, instead of by the law of the country where they are resident. As regards the duty of support as between persons who are not of the same nationality, the Japanese *Law Concerning the Application of Laws in General* (Art. 21) provides that it is to be determined by the law of the home

country of the person bound to furnish support. It would seem, however, that this is not properly worded, inasmuch as the question to be determined first of all will be whether the person against whom support is claimed is really bound to furnish the same, though it must be admitted that this previous question, and, (in case he is found to be bound to furnish support) the extent to which he is bound to do so, should be determined by the law of the home country of the party against whom such claim has been instituted.

(5) *Succession or wills.*—Succession (*sōzokin*) is governed by the law of the home country of the ancestor—i.e.—the person to be succeeded to (*ditto*, Art. 25), while a will (*yuigon*) is governed by the law of the home country of the testator: Art. 26, par. 1 of the said law providing that “as regards the formation and effect of a will, the law of the home country of the testator at the time of its formation governs,” inasmuch as in each country the law governing succession and wills has been made with regard to its own natives. This is the principle acted on not only in Japan but, generally speaking, in other civilized countries also.

(6) *Matters relating to the special quality of a nation.*—These are also not governed by the “territorial principle.” For example, the right to become public functionaries of a given country is a right which appertains to the special quality of persons as the natives of that country, and so it is not to be bestowed on foreigners who are resident in that country. For the same reason, the duty to serve in the Army or Navy (*heiki no gimu*) and other similar duties are never imposed on foreigners. Not so, however, with private rights the enjoyment of which should be granted not only to natives but also to foreigners, because private rights are rights the enjoyment of which is indispensably necessary in order that human beings may live and exist as such. For the Japanese laws and ordinances by which political and military rights are withheld from foreigners, the reader is referred to the *Law of Election of the Members of*

the House of Representatives, the Law for the Organization of Urban and Rural Prefectures, the Law for the Organization of Districts (Gun), the Law for the Organization of Cities, the Law for the Organization of Towns and Villages, the Conscription Ordinance, the Ordinance Concerning the Status of Military Officers, the Ordinance Concerning the Status of Naval Officers, etc.

* * . * * *

The more important of legal relations which are generally governed by the "territorial principle" are as follows:—

(1) *Real rights in Movables and immovables.*—These are, as a rule, governed by the law of the place where they exist—a principle which is laid down in Japan by Art. 10 of the *Law Concerning the Application of Laws in General*. Thus, when a Japanese subject owns land in England, matters relating to real rights in such land are governed, not by the Japanese law, but by the English law. The same applies to real rights in movables. Various theories, however, have been advanced in opposition to the above principle, the most notable of them being that movables should be governed by the law of the home country of the owner, while immovables only are to be governed by the law of the country where they exist—a theory which has, so far, been illustrated largely by judgments of the British Courts. The theory in question is founded on the following considerations, namely, (a) that if movables are to be governed by the law of the country where they exist, a man who possesses movables in several countries will be put to the inconvenience of being governed by the different laws of different countries in regard to different sections of his property and (b) that movables are of a nature to be removed from place to place, and so if they were to be governed by a different law each and every time they were removed from one country to another, it would entail considerable inconvenience to the public, because the law by which they were governed would differ day after day, should they be daily removed.

On the other hand, the opposite view that even movables should be governed by the law of the country where they exist, too, is supported by more than one plausible argument, the strongest of which is, perhaps, the objection : if movables are to be governed by the law of the home country of the owner, by the law of the home country of which co-owner are they to be governed, when they are jointly owned by two co-owners each of whom belong to a different nationality ?

(2) *Contracts (keiyaku).*—By the law of which country a contract is to be governed is a matter which the parties may freely settle by their mutual agreement. But in case the parties have entered into no special stipulation on this point, it is a rule that it should be governed by the law of the country where it was made. In case, for example, a Japanese subject has entered into a contract with a Britisher in a State of the United States, the contract is governed neither by the Japanese nor by the British law, but by the law of the particular State, because it was entered into in that State. This is what is provided in Art. 7 of the *Law Concerning the Application of Laws in General* :—

“ As regards the existence (formation) and effect of a juristic act, the question as to the law of which country is to govern is determined by the intention of the parties.

“ In case the intention of the parties is uncertain, the law of the place where the act was done shall be followed.”

Various theories are, however, advanced against this theory. Art. 10 of the Italian Civil Code, for example, provides that when the parties to a contract are of the same nationality, the law of their home country shall govern. According to another theory, a contract is to be governed by the law of the place fixed for its performance, because performance is a matter of the first importance concerning contracts. According to a third, a contract is to be governed by the law of the home country of the creditor, because special importance is to be attached to the

creditor ; but this is opposed by a fourth, which is entirely contrary to the last, and according to which a contract is to be governed by the law of the home country of the debtor. There is a fifth according to which a contract is to be governed by the law of the country where an action has been brought in connection with it. The theory, however, that the law of the place of the act shall govern is generally accepted (even though some objections may be raised to it), because (1) it must in most cases be the intention of the parties to abide by the law of the place where they transacted the business, and (2) because the law of the place of the act is most intimately connected with the contract.

(3) *Penal law.*—All persons are bound to obey the penal laws of the country where they reside, because, where an offence is committed, the peace and order of the place of its commission is at once affected in consequence. Thus, when an Englishman has committed theft in Japan, he cannot assert that he has a right not to be dealt with under the Japanese penal law, because he is a Britisher. This is the reason why a penal law is said to be a law based on the "territorial principle." Though penal law is thus essentially based on the "territorial principle," there is at the same time nothing to prevent its containing an ingredient based on the "personal principle." So far as matters affecting the peace and order of a country are concerned, however, penal law must act entirely and absolutely on the territorial principle, because to recognize the application of the laws of other countries in such matters might result in jeopardizing the very existence of one's own country. It is also in pursuance of the same principle that Art. 30 of the Japanese *Law Concerning the Application of Laws in General* provides that "in case the law of a foreign country should otherwise govern, it shall not govern if its provisions are contrary to public order or good morals."

(4) *Forms of juristic acts.*—This is always governed by the law of the place of the act—a principle which is briefly expressed in the maxim : "*The place governs the act*" (*basho wa kōi*

wo shihai-sn). This principle, however, does not mean that an act is, in all respects, governed by the law of the place where it was done, but that such law governs in so far only as the FORM of the act is concerned. There is no country where this principle is not acted on, because if the form of a juristic act is not to be governed by the law of the place of the act, an act which was done in due form according to the law of the place of the act—a law which it is usually easiest for the parties to ascertain—may, in some other country, be regarded as neither done nor formed, to the great inconvenience of the parties, because it did not fulfil the formal conditions required by the law of such other country. In case, for example, a Japanese man and woman have contracted a marriage in France, notification thereof is to be made in accordance with the form required by the French law, because even if they made such notification by presenting to the French Registrar a document written in Japanese, it would be utterly impossible for him to make anything of it. There is some doubt as to whether this principle is compulsory or optional. But it is believed that it is properly to be regarded as optional, because if it was regarded as compulsory, that would render it impossible for the parties to a contract to execute it (in a foreign country) according to the law of their home country (in reference *vide* Arts. 8 and 13 of the law above referred to).

(5) *Nationality.*—The nationality of a new-born child is, according to the "personal principle," determined by the nationality of the father or mother; while according to the "territorial principle," it is determined by the place of its birth. In a majority of modern states, the question is determined by parentage—that is, according to the "personal principle"—and it is only where the parentage of a child is uncertain that the "territorial principle" is acted upon and its nationality determined by the place of its birth. The Japanese *Law of Nationality*, too, is based essentially on the principle that the nationality of a new-born child should be determined by its parentage, but it does not entirely ignore the principle that the question should be

determined by the place of its birth. If some countries act absolutely on the "personal principle" while others act absolutely on the "territorial principle" persons may sometimes be found to belong to more than one country by nationality, while it may happen with others that they belong to no country whatsoever. In this respect, therefore, it is highly desirable that all countries should adopt the same legal system. As to who are Japanese subjects by birth under the present Japanese law, the matter may be summarized as follows:—

1. A child is a Japanese, if its father is a Japanese;
2. A child is a Japanese, if its mother is a Japanese, in case its father is unknown or possesses no nationality;
3. A child is a Japanese, if its father was a Japanese at the time when it was first conceived, even though he is no longer a Japanese at the time of its birth, having previously lost Japanese nationality owing to divorce or dissolution of adoption;
4. A child born in Japan is a Japanese even though its father and mother are unknown;
5. A child even born between a couple who possesses no nationality is a Japanese, if born within the territory of the Japanese Empire.

* * * * *

It is a rule that laws should operate throughout the country, but it sometimes happens that special laws are enforced in special places only, the enforcement of a set of special laws in Formosa only being a case in point in Japan, as many similar instances are met with in other countries which are possessed of colonies. There are also laws which apply exclusively to certain special persons and only in regard to certain special matters. It is thus that laws operate in all parts of the country, and in regard to all persons, only where there is no special provision to the contrary.

So far, we have at length explained the effect of law in regard to persons and place. It now remains for us to consider

a few important questions relating to the effect of law in regard to time and place, namely :—

- (1) At what time is a contract between persons at different places formed ?
- (2) At what time and according to the law of which country is a contract between persons in different countries formed ?
- (3) According to the law of which country is an offence to be dealt with, in case the act constituting it was committed in one country, but the result of the same occurred in another ?

(1) *At what time is a contract between persons at different places formed ?*—This is a matter which should be determined by the mutual agreement of the parties: but it is necessary for the law to determine in advance how the matter is to be decided in case the parties do not agree, or in case their intention is uncertain. There are various theories in this respect, the principal of which are as follows :—

- i. *That the contract is formed when the offerer receives notice of acceptance from the offeree and obtains knowledge of the fact of his offer having been accepted.*—This theory is based on the consideration that it will be oppressive to hold the acceptor bound before the fact of there having been an agreement of intention is known to the offerer, even though there has been such agreement of intention. But if, according to this theory, it is necessary for the acceptor to communicate the fact of his acceptance to the offerer, it must also be regarded as necessary for the acceptor to obtain knowledge of the fact that the offerer obtained knowledge of the fact of his offer having been accepted, and so on *ad infinitum*—thus endlessly putting off the time when the contract is to be finally regarded as formed. When an offer of a contract has been made and accepted, there has been an agreement

of intention, and it would appear unnecessary that the fact of there having been such an agreement should be communicated to the offerer.

2. *That when the offer is accepted, the contract comes into existence simultaneously.*—This theory is based on the idea that the criterion to determine whether a contract has been formed or not is to be sought solely in the consideration of whether there has been an agreement of intention or not. But this, too, involves no small difficulty, for, according to it, it will constitute a rescission of contract, even if the acceptor recalls, by telegraph, his acceptance conveyed by a letter before that letter has reached the offerer. To place restraint on the will of the acceptor in this manner, notwithstanding that no harm has been done to the interests of the offerer, is unreasonable in the extreme, nor is it productive of any practical advantage.
3. *That the contract is formed when the offeree has accepted the offer and despatched notice of such acceptance.*—This is the theory adopted by the Japanese law, for Art. 526 of the *Civil Code* provides :

“A contract *inter absentes* comes into existence when the notice of acceptance is despatched.

“In case the notice of acceptance is not necessary on account of an expression of intention of the offerer to that effect or according to the custom governing such transactions, the contract comes into existence when a fact has occurred which can be recognized as an expression of intention to accept it.”

But this theory is likewise open to many objections. First of all, it is uncertain what time is to be regarded as the time when the notice of acceptance has been despatched. For example, is the contract to be regarded as formed when a letter containing notice of acceptance is handed to a servant to be put

into a post-box, or when the servant has actually put it into a post-box, or when the post office has sent it forward? Though it is suggested by some people that the time when the letter has been placed out of the control of the acceptor is the time when the notice of acceptance has been despatched, yet this, too, cannot be accepted as an entirely sound and accurate standard. Secondly, the theory is objectionable, inasmuch as it involves cases where the acceptor may be held answerable for a rescission of contract, notwithstanding that he has caused no damage to the offerer, as when the offeree having despatched a letter of acceptance by post, gives notice of non-acceptance by telegraph or telephone, so that the latter notice reaches the offerer before the letter of acceptance—an objection, in short, the same as that which has been raised against the theory noted under No. 2.

(2) According to the law of which country is a contract between persons in different countries formed (no matter whether such persons are of the same nationality or otherwise)? Is it to be formed according to the law of the country from which the offerer despatched his offer, or according to the law of the country where the offeree accepted such offer, or according to the law of the country where the offerer received the notice of acceptance? Suppose, for example, "A," a Japanese subject, despatched from Rome to "B," an Englishman, an offer to sell to him (B) 10,000 metres of silk, and "B" received the letter containing such offer in France, wrote a letter of acceptance in Germany, and put it into a post-box in Russia, and the offerer received the notice of acceptance in America. Is the proffered contract to be formed according to the Japanese law or according to that of one of the other countries concerned—Italy, England, France, Germany, Russia and America? Art. 9, par. 2 of the Japanese Law Concerning the Application of Laws in General runs:

"As regards the formation and effect of a contract, the place from which the notice of the offer is despatched is regarded as the place of the act. In case the recipient of the offer is ignorant, at the time of his acceptance, of the place from which the offer was despatched, the place of the offerer's domicile is regarded as the place of the act."

In short, the Japanese law acts on the principle that a contract between persons in different countries is formed according to the law of the country from which the offer was despatched—a principle best calculated to promote the interests of both the offerer and the acceptor. The acceptor knowing that the offerer is prepared to abide by the law of the country from which the offer was despatched, he is enabled to decide whether to accept or not to accept, on investigating the law of the country from which the offer was despatched. If the contract is to be formed according to the law of the country from which the notice of acceptance was despatched, it will be necessary for the offerer to know beforehand from what country he is to expect such notice—a thing which is not always easy for him to ascertain, and he may find himself bound by a law of which he knows nothing. The principle on which the Japanese *Law Concerning the Application of Laws in General* acts is, therefore, now generally accepted by other countries also. Thus, in the case of the illustration mentioned above, the contract is formed according to the Italian law, because the offer was despatched from Rome, no matter whether the Britisher to whom the offer was made despatched notice of acceptance from Russia or any other country and whether the offerer received such notice of acceptance in America or any other country.

There is, however, a theory, as well as a practice, according to which contracts between persons in different countries are classified into (1) contracts between persons of the same nationality but in different countries and (2) contracts between persons not of the same nationality and in different countries; and in the

case of contracts between persons of the same nationality, the law of their home country is applied, while the law of the place of the act governs, so far as contracts between persons not of the same nationality are concerned. The Italian Civil Code (Art. 10), for example, provides that the existence and effect of an obligation are governed by the law of the country where the contract was made, that if the parties to a contract are foreigners of the same nationality, the law of their home country governs, and that in any case the law preferred by the parties shall govern first. The old Japanese *Law Concerning the Application of Laws in General* contained a similar provision ; but the present law does not recognize the discrimination between contracts between persons of the same nationality and contracts between persons not of the same nationality, on which such provision is based.

(3) *According to the law of which country, and by the law courts of which country, is an offence to be dealt with, in case the act and result have occurred in different countries ?*—In case, for example, a subject of country "A" shot a gun from country "B" and killed a subject of country "C" resident in country "D," which country is to exercise jurisdiction over the case, and according to the law of which country is the case to be decided? Some persons hold that the matter is to be dealt with by the law courts of the country where the act—shooting in the case under consideration—was done, and according to the law of that country ; while others affirm that it should be dealt with by the courts of the country where the *result* of the act occurred, and according to the law of that country. It would appear appropriate that the matter should be dealt with by the courts, and according to the law of the country, where the act resulted in a tangible phenomenon, because an act cannot be regarded as an offence, so long as it does not bear fruit in the shape of some definite result.

CHAPTER 15.

EXECUTION OF LAWS.

From the provision of Art. 6 of the Imperial *Constitution* which runs : “*The Emperor sanctions laws and orders them to be promulgated and executed,*” we learn (1) that the execution of laws appertains to the supreme power of the Emperor and (2) that the Emperor does not execute them himself but empowers a certain organ of the State to do so. Such organ is sometimes composed of judicial officials and sometimes of administrative officials—each organ executing laws within the scope of the powers entrusted to it. Thus, judicial officials must not only not encroach upon the power of administrative officials and *vice versa*, but even among judicial officials themselves, and among administrative officials themselves, they must not trespass on each other’s province. For example, the Department of Agriculture and Commerce must not trespass on the province of the Department of Home Affairs ; and the Supreme Court must not encroach upon the powers of the Local Courts.

But a conflict of power must nevertheless occur from time to time, and that either positively or negatively, a positive conflict being where two offices simultaneously claim to possess power to deal with a given matter, while a negative conflict is where each of two public offices contends that a given matter does not come within its power. In Japan, in case a dispute arises relative to competency between various departments of state, the matter is referred to the decision of the Cabinet (*Regulations for the Organization of the Cabinet*, Arts. 5-7). In some foreign countries, however, there is a special court which adjudicates upon disputes of this kind.

There is a considerable difference between the manner in which laws are executed by administrative officials and the way in which they are executed by judges. Judges are not empowered to render judgments unless in virtue of formal applica-

tions made therefor, the persons who make such applications being ordinary plaintiffs in the case of civil, and public procurators in the case of criminal matters. This is what is known as the principle of "No complaint, no judgment" (*fu-koku fu-ri*). Administrative officials are, however, bound to execute the laws, even though no applications may be made to that effect. Should a policeman detect a thief in the act of breaking into a citizen's house, for example, it is his official duty to arrest him forthwith and without awaiting an application from the master of the house or any other person. Further, judges are not empowered to render judgments in regard to matters other than those which have been referred to them for decision. Another difference between the execution of laws by administrative officials and by judges is, that while Art. 57 of the *Constitution* provides that judicial power is exercised by the Law Courts in the name of the Emperor, there is no such provision in regard to the execution of laws by administrative officials. There are also provisions by which judges are required to comply with certain special formalities in the execution of laws. Thus, the presence of court clerks is required for legalizing the proceedings of judges, judgments must be reduced to writing, certain courts must be collegiate, and so on. Judges are further barred from adjudicating upon matters which have once been dealt with by irrevocable judgments. This is known as the principle of *res adjudicata* (*ichiji fu-sairi*).

It may be asked whether persons charged with the execution of laws may refuse to execute such laws on the ground that they consider them to be illegal. Whether laws are substantively illegal or not illegal is a question of legislation; and so neither judges nor administrative officials possess the power to investigate the legality of laws and decide whether they ought to be executed or not. But if a so-called "law" is inherently defective in form, it is, then, defective in the essential elements which make laws what they are—that is to say, it is not a "law" at all, and, therefore, the judges, etc. need not—indeed,

must not—execute it ; such being the case—for example—where a document containing a so-called “ law ” does not bear the Imperial Seal, or is not countersigned by the Ministers of State in the proper way.

CHAPTER 16.

CLASSES OF JURISPRUDENCE.

SECTION 1.

CLASSIFICATION BASED ON LAND.

According to this standard, jurisprudence may be classified into (1) general jurisprudence and (2) local jurisprudence. *General jurisprudence* (*ippan hōgaku*) is the science of law comprehending the laws of all countries ; while *local jurisprudence* (*kyōkuchi hōgaku*) is the science of law as confined to the law of a particular country or locality. This is a classification adopted by English jurists such as Bentham and Austin. The study of general jurisprudence is highly instructive in that it presents to the student those elements which are common to, and pervade, the laws of all States.

SECTION 2.

CLASSIFICATION BASED ON TIME.

Jurisprudence may also be classified into (1) that dealing with present laws (*genkō hōgaku*) and (2) that dealing with non-present laws (*hi-genkō hōgaku*), or—as Bentham put it—into (1) the science of ancient law and (2) the science of modern and present law. These two branches of jurisprudence are of great assistance for the purpose of legislation : it is incorrect to think that their scope is limited merely to the study of past and present laws respectively.

SECTION 3.

CLASSIFICATION BASED ON LEGAL PHENOMENA.

According to this standard, jurisprudence may be classified into (1) common jurisprudence and (2) special jurisprudence. Common jurisprudence (*futsū hōgaku*) is founded on all legal phenomena, as in the case of encyclopædias of jurisprudence and legal philosophy; while special jurisprudence (*tokubetsu hōgaku*) deals only with special legal phenomena, such as the nature of rights under the criminal law, of duties under the administrative law, or of sale under the civil law.

SECTION 4.

CLASSIFICATION BASED ON PRINCIPLES ON WHICH
LAW IS STUDIED.

A. *Natural jurisprudence* (*shizen hōgaku*) or *jus naturale*.—According to those who advocate natural jurisprudence, there are innate rules and principles pervading the universe—that is—there are natural laws. In making laws, therefore, legislators ought to observe and act conformably with such natural laws, so the student of law should endeavour to ascertain those rules and principles which exist in nature and on which law is founded. But even those who advocate natural jurisprudence are not unanimously agreed as regards what constitutes the foundation of those principles of law which they believe to exist in nature; they may, however, be divided into three principal schools.

(a) *Those who believe in purely natural law*.—This school is subdivided into various branches among which we may mention the theological school, according to which the legislator makes laws according to the will of God, and there are no laws apart from the divine will. Another offshoot of the same branch is, however, opposed to the above. It does not recognize laws to have been made according to divine commands, but vaguely affirms that there exists what is called “natural law.” But those

who believe in purely natural law agree in thinking that law exists in nature outside the will, body, etc. of man.

(b) *Those who believe in reason (risei).*—According to these, man possesses what is called "reason," which enables him to distinguish right from wrong and good from evil, and so it is proper for man to do what his reason dictates ought to be done, and to refrain from doing what he is forbidden by his reason to do.

(c) *Those who believe in human nature.*—According to these, human nature possesses the innate power to control law. While those mentioned under (b) hold that law is based on reason, these affirm that law is based on, and is modified by, human nature.

B. *Interpretative or annotating jurisprudence (chūshaku hōgaku).*—It is the object of this kind of jurisprudence to interpret the letter and meaning of law. Interpretative jurisprudence has always existed from ancient times to our own days and will always exist so long as law exists. But it is improper that all efforts should be concentrated in the direction of interpretation to the neglect of other phases for investigation. Under the Tokugawa régime in Japan, jurisprudence was confined almost exclusively to the study of the meaning of the so-called "Hundred Articles" (*Hyakkajō*)—the principal law in that period of Japanese history. In Europe, interpretative jurisprudence was in great vogue from the beginning of the 12th to the middle of the 13th century. The drawbacks of this kind of jurisprudence are—*inter alia*—(1) that it is liable to cause the student slavishly to adhere to the letter of the law to the neglect of the basic principles underlying it, (2) that it absorbs the attention of the student in the study of present law, forgetful of matters which promote the amendment and improvement of the law, and (3) that it tends to prevent the student from making an historical study of law. Thus, when interpretative jurisprudence is in vogue, there is often reason to fear that the progress of law will be, to a greater or lesser extent, suspended.

As a result of the compilation of the *Code Napoleon* by Napoleon I, for example, both scholars and people devoted themselves to the study of the text of the law to the neglect of general legal principles; and there are traces tending to show that this obstructed the progress of jurisprudence in France.

C. *Analytical jurisprudence* (*bunseki hōgaku*).—This is the study of law, the essential feature of which is to analyze juristic acts into their elements in order to ascertain the principles by which such acts are governed, as, for example, sale is analyzed into (1) the parties—the seller and the buyer—and (2) the subject-matter, it being necessary for one of the parties—the seller—to have an intention to transfer the ownership of the subject-matter to the other party—the buyer—in consideration of the payment of a sum by the latter party.

D. *Historical jurisprudence* (*rekishi hōgaku*).—This aims at finding and ascertaining rules and principles of law by examining legal phenomena in the light of history. An opinion on a given matter formed simply in view of the present circumstances is apt to be narrow and partial. The principle by which a matter is governed can only be fully and completely ascertained by studying it with reference to the circumstances of the past as well as to those of the present. This theory was advocated by Bacon in England, Bodin in France and Leibnitz in Germany. The dispute which once arose in Germany as to whether laws should be codified or not was nothing more nor less than a battle between the historical and the non-historical school of jurists.

E. *Comparative jurisprudence* (*hikaku hōgaku*).—This has for its object the determination of rules and principles of law by comparing the laws existing in various countries or in various parts of one and the same country, as, for example, the student of constitutional law endeavours to find general rules common to all constitution by comparing the constitutions of constitutional monarchies like Japan and England, those of republics like France and the United States, and those of despotic monarchies such as

Russia and China formerly were. The study of comparative jurisprudence was first advocated by Vicco of Italy and carried into practice by Montesquieu of France. A comparative study of laws had not been commenced earlier because of the impediments to which international communication had been subject; but with the development of means of transit, and the consequent increasing intimacy of international intercourse, the comparative study of laws has, like other sciences, received great impetus and encouragement, until now we have even flourishing societies established for the purpose.

Comparative jurisprudence may be divided into the following three classes :—

(a) *Comparative jurisprudence in regard to legal lines or systems*, which traces the laws of various countries to their sources and determines what differences there are, in point of legal principles, among the several legal lines or systems ;

(b) *Comparative jurisprudence in regard to states*.—This traces the differences existing among the laws of various countries to the differences among those countries in point of manners and customs, temperament, etc ;

(c) *Comparative jurisprudence in regard to races*.—This is a study which has been strongly advocated by Poste, the German, and by Maine. In ancient times, laws were mostly operative on the personal, instead of on the territorial, principle ; the personal principle in this connection meaning that men were governed by the law of the race, not of the state, to which they belonged. It was only after states were organized owing to the sheer necessity of existence that, as Maine points out, laws ceased to be racial and became national. So, in order to trace laws to the furthermost fountain-head, it is necessary to make a comparative study of the laws of races which are the origin of laws.

CHAPTER 17.

RELATIONS BETWEEN LAW, MORALITY, AND RELIGION.

In olden times, no distinction was recognized between legal and moral rules. Both were regarded as essentially necessary for the purpose of ensuring the existence of the state, or any other body or organization, or of individual persons, and maintaining the order of society. In ancient times, for instance, philosophers like Plato and Cicero recognized no distinction whatever between the two. It is only since the time of Spinoza and Pufendorf that a distinction has been drawn between them by scholars. The more important views with regard to the relation between them may be summarized as follows :—

(1) That legal and moral rules are essentially different things : law is derived from the will of the sovereign exclusively, but moral rules are not. Laws which are supported by morality are laws no less than laws which are not supported by morality. Even though law may happen to be agreeable to the requirements of morality, the two cannot be regarded as possessed of an identical nature ;

(2) That legal and moral rules are different, because legal rules are made by man and can be freely continued or discontinued by man ; while moral rules exist in nature and cannot be modified by the will or power of man ;

(3) That morality exercises compulsion from within, while law exercises compulsion from without—in other words, morality restrains the *will* of man, while law restrains the *action* of man. According to this theory, it is morality that causes a man to resolve not to steal ; but it is law that causes him to refrain from actually committing theft ;

(4) That law is negative in its object, while morality, is positive—in other words, law aims at causing men not to injure others, while morality aims at causing men to do good to

others. But it would seem that this view is not entirely sound, inasmuch as there are legal rules which encourage positive good, while there are moral rules which are negative in their tendencies ;

(5) That legal rules are the commands of God to individuals, while moral rules are the commands of God to the public. But there are legal rules which are binding upon the public, while there are moral rules which are intended to be observed by individuals ;

(6) That law governs men as nationals, while morality governs men as individuals. Japanese law, for example, governs the Japanese nation only ; but moral rules are operative not only upon the Japanese nation but upon foreigners and those persons who belong to no country whatsoever. The drawback of this theory, however, is that it does not take into account the fact that among moral rules, too, there are some the application of which is confined to a certain country or to a certain society. For example, the obligation which in the Tokugawa régime in Japan compelled *bushi* to commit *harakiri** in certain cases was a moral rule which was confined to a certain class only among the Japanese nation. Besides, there are legal rules which govern people in general, irrespective of the question of what nation they belong to. Civil law, for example, does not govern men as nationals, but as individuals, and so applies not only to the natives of a given country but also to foreigners resident within the bounds of that country ;

(7) That while legal rules vary from time to time and from place to place, moral rules are fixed permanently and uniformly in all places. This view, however, is weak in that even moral rules often differ in different places and in different ages ;

(8) That legal rules are worked by compulsory force but moral rules are not worked by compulsory force. As a matter of fact, however, in most cases, people obey law, not because they are forced to do so but for other reasons. Besides, there

* Suicide by cutting open the belly, only practiced by "gentlemen."

are legal provisions which cannot be carried into execution even by compulsory force. Ihering, therefore, remarks that law is that which can be compulsorily enforced in some cases.

There can be no doubt, however, that law and morality have the same object : they are both intended to maintain the order of the State, and that they only differ in the *form* in which they come into existence. Rules which have been made by the State in conformity with the conditions which have been previously fixed by the State for the making of laws are legal rules ; but no such formal conditions exist in regard to moral rules. Thus, there are cases where legal agree with moral rules in substance, and others where they do not agree. Should the State give the form and force of law to rules which have been morally established, such moral rules then become legal ; but otherwise they remain moral rules only.

Religion (*shūkyō*) is based on belief, but law contains no ingredient of belief. This is one point on which the two radically differ from each other. In ancient times, worship and government were one (*saisei-itchi*) and religion was confounded with government and law ; but, at present, religion has parted company with government and law. In ancient times, again, it was believed that law was derived from God as well as religious commands ; but the view generally accepted now is that law is not the handiwork of God. It was perhaps as a mere policy on the part of the lawgiver, who aimed at securing permanent and unquestioned observance of his commands, that it was confidently declared that law was ordained by the Deity.

CHAPTER 18.

LEGAL RIGHTS.

SECTION I.

NATURE OF RIGHTS.

Rights (*kenri*) are the products of law : there are no rights where there is no law. Rights implied in phrases such as natural rights (*shizen no kenri*), rights inherent in man (*tempu-jinzen*), the equality of the sexes (*danjo dōken*) are not rights from the legal point of view. Right and law go hand in hand : persons have rights only where law extends protection to them. It is for this reason that in certain foreign languages, right and law are represented by the same word. As right and law are thus identical in a sense, so rights and duties are identical things regarded from different points of view. What is a right from the view-point of the creditor is a duty from the view-point of the debtor. To ask which has come into existence first—right or law—would be as idle as to ask which has come into existence first in a monarchy—the sovereign or the people.

As to the nature of "right," there are three different theories, namely :—

(1) *That right is freedom.*—According to this view, right is the boundary determined by law within which persons may act freely. Persons have the *right* to act within the boundary of freedom prescribed to them, but they have *no right* to act outside such boundary ;

(2) *That right is interest.*—This is a view advocated by the English utilitarian school and also by many German jurists. Ihering, for example, affirms that right is interest protected by law, more especially, the right of action (*soken*) ; and the same view is also adopted by Merkel and Bentham ;

(3) *That right is power.*—According to this theory, law is made by the stronger portion of a body or organization, and

right is what is conferred by such stronger portion by its power. It is by the power which it implies that right places restraint upon the power of others. As to by whom that power is bestowed, supposing right to be power, opinions differ, some affirming (1) that it is power given by God, others (2) that it is power given by the sovereign, and others, again, (3) that it is power given by the whole people.

From what has been said, right may now be defined as follows :—

“ Right is that by virtue of which an action or omission can be compulsorily required, under the protection of law, against a person or body (organization) other than oneself.”

Analyzed more minutely, this definition means :—

- 1 That right is protected by law : rights other than those protected by law are not “ rights ”;
- 2 That right is compulsory because it is protected by law ;
- 3 That right compels an act to be done or not to be done ;
- 4 That right operates against persons or bodies (organizations) other than oneself. It may operate either against a specific person or against persons in general. According to an old-fashioned theory, rights are classified into (1) rights against persons (*taijin-ken*) and (2) rights against things (*taibutsu-ken*). But the relation between persons and things is not a relation of right. When a person is said to have a right of ownership in a thing, it does not mean that he has a right against the thing, but that he has a right against other persons in regard to that thing. Thus, even if a horse owned by a certain person runs away, that fact alone bestows no right upon him against any other person—that is to say, he has no right against the horse itself.

The means by which rights are protected are actions. An

action is a process by which the power implied in a right is evoked by the authority of the Court against the transgressor upon the said right. Though recourse is usually had to the power of the law for the protection of rights, persons are sometimes permitted to help themselves. Such self-help is, however, neither more nor less than a reflection of the power of the law, because self-help is legal and legitimate only where it is specially permitted by law.

SECTION 2.

CLASSES OF RIGHTS.

The more important classifications of which rights are susceptible are as follows :—

(1) *Principal rights (shu-taru kenri) and accessory rights (jū-taru kenri).*—Principal rights are rights which exist independently of other rights ; while accessory rights are rights which exist dependently on other rights. This classification is useful for determining the effect of a right. For example, an obligation is a principal right, while a right of pledge or mortgage is an accessory right. An accessory right is extinguished simultaneously with the extinction of the principal right ; but an accessory right may be terminated without the principal right being terminated as a necessary result ;

(2) *Public rights (kōken) and private rights (shiken).*—The classification of rights into public and private rights is practically valuable because all persons are not enabled to enjoy both public and private rights. For example, even though the *Civil Code* (Art. 2) provides that foreigners enjoy private rights, it would be difficult to decide whether they should be enabled to enjoy a given right unless there was a fixed standard by which private can be clearly distinguished from public rights. There are various theories as to what constitutes a standard of distinction between public and private rights ; but the more important of them are as follows :—

a, That rights provided for in public laws are public

rights, while rights provided for in private laws are private rights—for example, rights under the *Criminal Code* are public rights, while rights under the *Civil Code* are private rights.—But this standard is not always reliable, because the *Constitution*—which is a public law—provides for private rights such as the inviolability of ownership and the inviolability of domiciles; while the *Bankruptcy Law*—which is a private law—contains provisions preventing rights under public laws from being bestowed on persons who have been condemned for fraudulent bankruptcy—that is, the Law provides for a public right to refuse rehabilitation to such persons;

b. That public rights are rights which determine the relations between the State and individuals; and private rights are rights which determine the relations among individuals themselves.—But this, too, is not a perfectly sound standard, because the relations between the State and individuals may sometimes be relations of private rights, as in the case of contract works, while the relations among individuals themselves are sometimes relations of public rights, as relations involved in election;

c. That rights relating to public interests are public rights, while rights relating to private interests are private rights.—But this view is ambiguous because it is, first of all, uncertain what are rights relating to public rights and what are rights relating to private interests;

d. It appears correct to assume that public rights are rights which the State bestows on individuals in matters which directly relate to the order of the State; and that private rights are rights bestowed on individuals in matters other than those above mentioned;

(3) *Rights against specific persons or rights against persons (taijin-ken) and rights against persons in general or rights against the world (taisei-ken).*—For example, the right of a seller to receive payment of the purchase-money from the buyer is a right against a specific person—the buyer—, while the inviolability of ownership and each man's right against insult are rights against

any and every person. They are, therefore, said to be rights against the whole world. But even third persons are bound to respect rights against specific persons. In this sense, rights against specific persons are also rights against persons in general; but rights against persons in general are not necessarily rights against specific persons. The practical advantage of this distinction consists in the fact that it enables one to determine against whom an action or omission can be demanded by virtue of a given right;

(4) *General rights (futsū-ken) and special rights (tokubetsu-ken).*—General rights are rights bestowed by general law on persons in general; while special rights are rights bestowed by special law on certain persons only. For example, it is by virtue of a general right that every person is protected from injuries to his life or person; while it is thanks to a special right that certain students enjoy a temporary exemption from enlistment, or that persons possessing a title of nobility and court rank are not liable to detention until certain formalities have been observed;

(5) *Individual rights (kobetsu-ken) and joint rights (kyōdō-ken).*—An individual right is a right which belongs to a single person, as when a person owns a horse; while a joint right is a right which is held by two or more persons in respect to one and the same subject-matter, as when "A" and "B" conjointly exercise a right in respect to a house, or when an author and his publisher possess a copyright in common in regard to a certain book. This classification is necessary in order to determine by whom a given right is to be exercised, and how, and in what manner, it is to be exercised and disposed of.

SECTION 3.

SUBJECTS OF RIGHTS.

The subject (in a grammatical sense) of a right (*kenri no shutai*) is a person, and, as to who should be enabled to enjoy rights, this is a matter which each state decides at its discretion.

A "person" (*hito*) in this connection, therefore, is to be regarded as anything which the State has enabled to be the subject of rights. In regard to persons, it is necessary to consider the following questions, namely, (1) what are persons, (2) at what time persons come into existence and (3) where persons are regarded as such.

As to who or what are persons, the question is to be considered under two heads—(1) what are natural persons (*shizen-jin*) and (2) what are juridical persons (*hōjin*). Natural persons are not necessarily persons in law, such having been the case with slaves in former days. Foreigners, too, were sometimes not regarded as persons in countries other than the country to which they belonged, even though they were natural persons. Under modern law, however, natural persons are always persons—that is, subjects of rights. Slavery is tabooed by the law of every civilized country. Thus, what are natural persons is now a question of anthropology rather than of law. According to the law of ancient Rome, the conditions for being persons, were held to be (1) that they were separated from the body of the mother—that is, they were born, (2) that they lived after birth, and (3) that they were not monsters. But to say that what is not born is not a person is not an answer to the question—what is a person?—but rather to the question—at what time a person comes into existence? To say that a child in the womb is not a person is, after all, tantamount to saying that it is not a person until it leaves the womb. But under the laws of various countries, a child in the womb is regarded as already born, and treated as a person so far as certain special relations are concerned. Art. 721 of the Japanese *Civil Code*, for example, provides that a child *en ventre sa mère* is regarded as already born with regard to the right of claiming compensation for damages; and Art. 968 of the same Code provides that a child *en ventre sa mère* is regarded as already born in regard to the succession to a house, but that the foregoing provision does not apply when the child is still-born.

What persons are treated as such is a question which it is nowadays quite unnecessary to consider, so far as natural persons are concerned; because what are persons in one country must necessarily be permitted to be subjects of rights in other countries. To treat foreigners as slaves is a practice, which is not sanctioned by modern laws. But the question is a very interesting one, so far as juridical persons are concerned.

A juridical person is an aggregate of persons or things, which, by virtue of legal provisions, is permitted to be the subject of rights; but exactly what are to be considered as juridical persons is a matter to be determined by the law of each country. Juridical persons are thus what are regarded as persons by the fiction of law (though there are persons who hold the opposite view, and assert that juridical persons exist really and actually and not by a legal fiction). The law of a country operating, as a rule, only within the boundaries of that country, it is self-evident that what are permitted to be juridical persons in one country cannot at once be regarded as such in another country, unless, indeed, the latter country has, by domestic law, provided that what are juridical persons in another country shall be juridical persons in that country also, or has by treaty agreed to treat foreign juridical persons on the same footing as native ones (in reference *vide Civil Code*, Art. 36).

Persons are possessed of legal capacity—that is, of legal qualification for enjoying or exercising rights. Capacity is thus classified into (1) capacity of right—that is, legal qualification for enjoying rights and bearing duties, and (2) capacity of action—that is, legal qualification for causing acts to take effect in law, whether they are legal or illegal (in reference see Chapter 14). The existence of persons does not always and necessarily imply the existence of full legal capacity, because in the case of natural persons, persons may exist without possessing full legal capacity; but in the case of juridical persons, they always possess capacity so long as they exist.

For physiological and other considerations, natural persons

are differentiated in legal value. Thus, persons of full age are distinguished from minors in regard to rights and duties : minors are placed under the supervision of guardians and are also exempted from the duty to serve in the Army or Navy. Married persons are not on the same footing as those unmarried in regard to rights and duties : married women cannot acquire or transfer property without the permission of their husbands, and neither husband nor wife can contract marriage with another person, so long as their marital relation is not dissolved. Further differences are made in respect to rights and duties according to whether persons are weak-minded or otherwise, or whether they are legitimate or illegitimate by birth.

Persons may be either (1) natives (*naikokujin*) or (2) foreigners (*gwaikokujin*). Art. 18 of the Japanese *Constitution* provides that the conditions necessary for being a Japanese subject shall be determined by law, and the conditions in question are determined by the *Law of Nationality* of the year 1899. All persons other than Japanese subjects are foreigners ; and so persons who belong to no country whatsoever are also foreigners. Persons who are Japanese subjects may be classified as follows in view of the causes by which they have become Japanese :—

- 1 Those who are Japanese subjects by birth ;
- 2 Those who have become Japanese subjects by naturalization ;
- 3 Those who have become Japanese subjects by marriage ;
- 4 Those who have become Japanese subjects by *nyūfukkon-in* (marriage by which men enter the houses of their wives who are heads of houses) ;
- 5 Those who, having been Japanese subjects originally, and then become foreigners, have again become Japanese subjects ;
- 6 Those who have become Japanese subjects by adoption ;

- 7 Those who have become Japanese subjects by recognition (acknowledgment);
 - 8 Those who have become Japanese subjects because of the cession to Japan of a foreign territory which they inhabit;
 - 9 Those who, being wives, have become Japanese subjects because their husbands have become Japanese subjects;
 - 10 Those who, being children in minority, have become Japanese subjects because their foreign father and mother have become Japanese subjects.
1. We have already seen who are Japanese subjects by birth (*vide* P. 91).
2. Persons become Japanese subjects by naturalization when they acquire Japanese nationality according to their desire. In order that foreigners may be naturalized, the following conditions must be fulfilled, namely :—
- (1) That they have been domiciled in Japan for at least five years consecutively prior to naturalization ;
 - (2) That they are at least full twenty years of age and possess legal capacity according to the law of their home country ;
 - (3) That they are of good conduct and behaviour ;
 - (4) That they are possessed of property or ability sufficient to lead an independent livelihood ;
 - (5) That they possess no nationality, or that they are to lose their nationality as a consequence of the acquisition of Japanese nationality.
- 3 and 4. Persons become Japanese subjects by marriage, when foreign women are married to Japanese men. When Japanese women are married to foreign men, the Japanese women become foreigners, instead of the foreign men becoming Japanese subjects. But when foreign men are married to Japanese women who are heads of houses and enter such houses, the men become Japanese subjects.

5. In order that persons who, having originally been Japanese subjects, have become foreigners may become Japanese subjects again, they are not required to pass through the tedious process of naturalization, because they were originally Japanese subjects. Persons under this heading may be classified into (1) persons who have lost Japanese nationality and become foreigners because of their marriage with foreigners; these may recover Japanese nationality with the permission of the Home Minister, if they are domiciled in Japan after the dissolution of their marriage; and (2) persons who have lost Japanese nationality and become foreigners according to their own desire or in company with their parents or their husbands; these may also recover Japanese nationality with the permission of the Home Minister if they are domiciled in Japan.

6. As regards persons who become Japanese subjects in consequence of their being adopted by Japanese subjects, it is unnecessary to give any detailed explanation.

7. Foreigners in minority become Japanese subjects, when their father or mother, who are Japanese subjects, recognize or acknowledge them to be their children; but for this purpose it is essential in the case of female minors, that they should not be the wives of foreigners, because if wives of foreigners could be converted into Japanese subjects by recognition at will, it would give rise to the anomalous result of the wives belonging to a nationality different from that of their husbands.

8. That the inhabitants of a foreign territory become Japanese subjects when such foreign territory is ceded to Japan is a matter which is *not* contemplated in the *Law of Nationality*. But as actual illustrations of this, we may mention the fact that the Chinamen inhabiting Formosa became Japanese subjects when that island was included in the territory of the Empire of Japan, and the fact that on the cession of part of Saghalien the inhabitants thereof became Japanese subjects *ipso facto*.

9. When husbands who are foreigners become Japanese subjects, their wives, too, become so, since, otherwise, various

.inconveniences would result because of the possible conflict between the laws of the countries, to which the husbands and wives severally belong, in regard to their respective rights and duties.

10. It is for the same reason that when parents who are foreigners become Japanese subjects, their children who are minors also become Japanese subjects.

The practical advantage of distinguishing natives from foreigners lies in the fact that foreigners do not enjoy the same rights or bear the same duties as natives. The more important of the differences between natives and foreigners in this respect are as follows :—

1. Even if a native of one country resides in another country it is merely a temporary phenomenon. Even though he may desire permanently to reside in that country, he must leave it if the authorities of the latter country order him to do so. But the subjects of a country have a right to live within the bounds of their country. In other words, the State has the right to banish foreigners from her boundaries and refuse to permit their landing on her territory ; but she cannot banish native subjects of her own from the country, nor has she the right to refuse admission to them when they come home from foreign parts. In history, however, we meet with many instances of a state having banished from the country persons who belonged to that state by nationality, the most notable event of this kind in recent times being the banishment of certain French noblemen from France. But such a practice is not legally recognized at the present day ;

2. The State has the right to demand certain specific acts from her subjects, such as service in the Army or Navy and the payment of certain taxes ; and subjects are not relieved from such duties, even though they may go abroad ;

3. The State has the right to protect her own subjects, even when they are in foreign countries—that is, subjects of a country enjoy the protection of such country; even when they are in a

foreign land, such protection being accorded by the Minister, Consuls, and men-of-war sent out by their home country, offering them shelter in case of danger, rescuing them when shipwrecked, granting public authentication in regard to various acts under private law, such as marriage and succession, and so on. These matters are usually provided for in detail by the law of each country. It is not by right, but by a special treaty, or at a special request, that one country protects subjects of a second country who are resident in a third country ;

4. The State has a right to demand that her subjects be faithful and obedient to her commands. It is true that even foreigners are bound to obey the commands of the state in the territory of which they temporarily reside, except those relating to political and military rights and duties. But even in matters in respect to which obedience is required from them, foreigners are bound to obey the law of the country only so long as they are resident there ; they are not, like natives, bound to do so, even after they have left the country. Besides, the right to provide for personal matters of individuals vests exclusively in their home country. In short, natives are bound absolutely to obey the law of the country in all matters ; but foreigners are bound to obey the same only in respect of certain relations and in certain cases ;

As for the enjoyment of private rights, there is more or less difference between the laws of various countries. Japanese law, like the laws of the majority of other countries, treats natives and foreigners on an equal footing in respect of private rights, except those which are forbidden by law or ordinance or treaty (*Civil Code*, Art. 2). It is considered, as a matter of course, that foreigners should be disqualified for political rights ; and special provisions are inserted in the *Law of Election of the Members of the House of Representatives*, the *Law for the Organization of Urban and Rural Prefectures*, the *Law for the Organization of Districts*, the *Law Concerning Police*, etc. The more important private rights, which foreigners cannot enjoy are (1)

the right to hold shares of the Bank of Japan, the Yokohama Specie Bank and the so-called "Agricultural and Industrial Banks" (*Government Decree No. 32* of the year 1882, *Imperial Ordinance No. 29* of the year 1887, *Law Concerning Agricultural and Industrial Banks* of the year 1896), (2) the right to be members or brokers of Exchanges (*Law No. 5* of the year 1893), (3) the right to become barristers (*Law No. 7* of the year 1893), (4) the right to own ships (*Law No. 46* of the year 1899), (5) the right to be owners of mines (*Law No. 35* of the year 1905), (6) the right of "placer-mining" (*Law No. 13* of the year 1909) and (7) the right to become pilots (*Law No. 63* of the year 1899).

SECTION 4.

OBJECTS OF RIGHTS.

The objects of rights (*kenri no kyakutai*) are things (*moto*). The Japanese *Civil Code* limits "things" to material things. "Things," however, in the wider acceptance of the term, should be taken as including immaterial (non-corporeal) things. "Things" admit of the following classifications:—

1. *Movables (dōsan) and immovables (fudōsan)*.—Movables are things which can be easily moved from place to place; while immovables are things which are fixtures to land and are not destined to be moved about (*Civil Code*, Art. 86). For example, boots and shoes are movables, while lands and buildings are immovables. Dwelling houses and other buildings can be removed from place to place but they are intended to be fixed to, and not to be separated from, land; and so they are usually included among immovables. The practical advantage of distinguishing movables from immovables is derived from the fact that the two are differently treated in law. For example, immovables require registration; but movables are not registered (*Civil Code*, Arts. 177 and 178). Immovables can be mortgaged, but movables cannot (*Civil Code*, 369);

2. *Negotiable or assignable things (yūshū-butsū) and non-*

negotiable or non-assignable things (fuyūshū-butsu).—Negotiable things are things which can be the subject-matter of transactions ; while non-negotiable things are things which are not fit to be the subject-matter of transactions. *Res sacrae* in Roman law, for example, the sun and moon, seas and oceans, the air, etc., are non-negotiable things ; while articles of food and drink, chairs and tables, etc. are negotiable things. It is true that there are articles, like poison, gunpowder, tobacco, camphor, etc., which it is forbidden to deal in except with official permission ; but these are not absolutely non-negotiable things. Things, however, which, like obscene pictures, are apprehended to be detrimental to good morals are non-negotiable things because they cannot be the legal subject-matter of transactions under any circumstances ;

(3) *Principal things (shubutsu) and accessory things (jū-butsu).*—A principal thing is a thing which serves its purpose independently ; while an accessory thing is a thing which serves its purpose only when attached to something else. Art. 87, par. 1 of the *Civil Code* provides that when the owner of a thing has attached to it another thing owned by him for its permanent use, the thing which is attached is an accessory thing. Thus, a safe is a principal thing while a key attached to it is an accessory thing. The real advantage of the distinction is felt because a juristic act relating to a principal thing extends to the accessory thing, unless there be a special stipulation to the contrary (*Civil Code*, Art. 87, par. 2). A principal thing and an accessory thing must be entirely different things. A thing contained or included in another, as a drawer in a chest of drawers, is not an accessory thing. In the same way, interest is not a thing accessory to the principal ;

4. *Exchangeable things (daitai-butsu) or non-specific things (futokutei-butsu)* and *non-exchangeable things (fudaitai-butsu)*. or *specific things (tokutei butsu)* (*Civil Code*, Arts. 400 and 401). —A thing which can be replaced by another of the same nature and quantity is an exchangeable or fungible thing ; while a

thing which cannot be so replaced is a non-exchangeable or specific thing. For example, one ton of rice is an exchangeable thing, but the rice contained in a particular box is a non-exchangeable thing. The genealogical record of a family, and the armour worn by a certain renowned warrior of olden times are things which cannot be replaced by others; and so they are non-exchangeable. This distinction is of practical value in connection with the performance of a contract. For example, whilst one bushel of rice is borrowed, the debtor is not bound to return the identical rice but may perform his obligation by returning one bushel of rice of the same kind and quality;

5. *Divisible things (kabun-butsu) and indivisible things (fukabun-butsu).*—Things which can be divided without their value being lessened, as, for example, rice, oil, etc. are divisible things; while a thing, like a picture, a live cow or a gem, which, if divided, will cease to serve its essential purpose or be reduced in value is an indivisible thing. It is not that a thing is said to be divisible or indivisible according to whether it is actually and physically divisible or indivisible;

6. *Consumable things (shōhi-butsu) and non-consumable things (hishōhi butsu) (Civil Code, Art. 587).*—A consumable thing (a thing for consumption) is one which, if once used, is extinguished or altered in form, as, for example, tobacco, fish, game, etc.; while a non-consumable thing (a thing not for consumption) is one which, though used, is neither extinguished nor altered in form, as a house, gun or ship. This distinction, too, is of great practical value in connection with the performance of a contract;

7. *Material things (yūtai-butsu) and immaterial things (mutai-butsu) (Civil Code, Art. 85 and Criminal Code, Art. 245).*—A material thing is property (anything possessing monetary value) which occupies space and is visible to sight—as, for example, a house, ship, etc.; while things like gas and light are immaterial things. The use of this distinction is derived from the fact that the two are not always governed by the same law.

For example, material things are fit objects of attachment (legal seizure) but immaterial things are not ;

8. *Owned things (yūshu-butsu) and ownerless things (mu-shu-butsu)* (*Civil Code*, Art. 239).—An owned thing is one which is subject to a right of some person or other ; while an ownerless thing is one in respect to which nobody claims any right whatsoever. Ownerless things, however, are transformed into owned things when they come under the right of some person. For example, birds in the air and fish in the sea are ownerless things ; but they become owned things when they are caught by fowlers or fishers.

CHAPTER 19.

LEGAL DUTIES.

A legal duty (*hōritsu-jō no gimu*) is an obligation, enforceable by law, to do, or omit to do, an act. This is a definition of a legal duty as viewed by itself. When viewed in connection with a right, a duty may be defined as that submission to a right which can be exacted, and enforced, by law.

BOOK II.

CHAPTER I.

CONSTITUTION AND IMPERIAL HOUSE LAW.

SECTION I.

INTRODUCTION.

(A) *In General.*

The *Constitution* (*Kempō*) of the Japanese Empire is a rigid one. It embodies those regulations which form the fundamental organization of the State, defines the powers of the direct and immediate organs thereof, and determines the rights, privileges and obligations of subjects.

The *Imperial House Law* (*Kwōshitsu Tēpan*) consists of organic regulations relating to the internal affairs of the Imperial House,

(B) *Form of Government.*

The Japanese form of government is a constitutional monarchy, inasmuch as, while the sovereign power technically vests in the Emperor, limitations are imposed upon the latter as to the organs by means of which such power is to be exercised in actual practice (*Constitution* Arts. 5, 55 and 57).

(C) *Principle of Hereditary Succession.*

The monarchy is hereditary, and the principles of the Salic Law which have been adopted specifically exclude females from the throne.

SECTION 2.

(A) *The Emperor (Tennō).*

All sovereign powers vest and combine in the person of the Emperor, and, within the scope of the *Constitution*, the Imperial will is regarded as that of the State. In some countries—notably in Great Britain—the government is carried on conjointly by Crown and Parliament, and in others—such as Greece and Belgium—sovereign powers are regarded as vesting in common in Crown and Parliament, and as emanating from the people; but the underlying theory of Japanese constitutional law—itself a mixture of ancient and modern ideas in a semi-German dress—must be carefully distinguished from that of the other constitutions to which allusion has been made (*Constitution* Art. 4). The Emperor is described as being “a descendant of the Gods,” and his person is deemed to be absolutely sacred and inviolable. He is not liable to be called to account for any act whatsoever, and by reason of the theory embodied in the maxim *rex non potest peccare*, he cannot, under any circumstances, be liable to legal punishment (*Constitution* Art. 3).

(B) *Imperial Prerogatives.*

The Emperor enjoys supreme power (*taiken*)—i.e.—certain powers which he can exercise at his personal discretion, that is, without obtaining the previous consent of the Diet. Arts. 6 to 16 of the Constitution vest in the Emperor (*inter alia*) the following powers:—

1. To declare war and make peace (Art. 13);
2. To assume supreme command of the Army and Navy (Art. 11) and to determine the organization and peace standing of both Services (Art. 12);
3. To proclaim a state of siege (Art. 14);
4. To conclude treaties (Art. 13);
5. To convoke the Imperial Diet; open, close and prorogue it and dissolve the House of Representatives (Art. 7);

6. To give sanction to laws and order them to be promulgated and enforced (Art. 6);
7. To issue ordinances (Arts. 8 and 9);
8. To appoint and dismiss civil and military officials (Art. 10);
9. To confer titles of nobility, rank, orders and other titles of honour (Art. 15);
10. To order amnesty, pardon, commutation of punishments and rehabilitation (Art. 16).

SECTION 3.

VACANCY OF, AND SUCCESSION TO, THE THRONE..

As previously stated, only male descendants in the male line can succeed to the Throne, female descendants and male descendants in the female line being debarred from such succession (*Constitution Art. 2* and *Imperial House-Law Art. 1*).

(A) *Order of Succession to the Throne.*

1. The Imperial eldest son ;
2. If there be no Imperial eldest son, the Imperial eldest grandson;
3. If there be neither Imperial eldest son nor any male descendant of his, the Imperial son next in age and his descendants ;
4. If there be neither Imperial sons nor any male descendant of theirs, an Imperial brother and his descendants ;
5. If there be no Imperial brother nor any male descendants of his, an Imperial uncle and his descendants ;
6. If there be no Imperial uncle nor any male descendant of his, the next nearest member among the rest of the Imperial Family.

Among the Imperial brothers, and among remoter Imperial relations (of the same degree of relationship), precedence is given to the descendants of full blood over those of half blood, and to the elder over the younger. (*Imperial House Law Arts. 2-8.*)

Should the Imperial heir be suffering from an incurable and serious disease, or should any other weighty obstacle exist in regard to him, the order of succession mentioned above may be altered with the advice of the Imperial Family Council and of the Privy Council (*Imperial House Law Art. 9*). It should, however, be noted that a change in the order of succession does not imply the loss on the part of the Imperial heir of the *right* to ascend the Throne.

Between the vacancy of, and the succession to, the Throne there is no interregnum, on the principle of *rex minguam moritur*; therefore even if an Emperor should die leaving his consort *enceinte* with his first child, the question of succession is decided without any regard to the *nasciturus*. This provision differs from the case of succession to an ordinary family, because in the latter case it is specially provided in Art. 968 of the Civil Code that a child in the womb is regarded as already born.

(B) Coronation Ceremonies (*Sokui-shiki*).

These ceremonies are simply performed to commemorate a succession to the Throne with befitting solemnity, but such ceremonies do not indicate the starting-point of the succession (*Imperial House Law Art. 11*).

SECTION 4.

REGENCY (*Sessei*).

A Regency is an organ of the State (of a temporary nature) which exercises sovereign powers in place of the Emperor, when the latter is a minor or is prevented by some permanent obstacle from personally governing. When the Emperor is in minority—that is, when he is under 18 years of age*—a Regency is always instituted. When he is prevented, by some permanent obstacle, from governing personally, the institution of a Regency

* In the case of ordinary persons, majority is fixed at full twenty years (*Civil Code Art. 3*).

is decided upon by the Imperial Family Council and the Privy Council, such institution being proposed either by the Imperial Family Council or by the Privy Council.

(A) *The Regent is not the Guardian of the Emperor.*

The Regent is not the guardian of the Emperor, inasmuch as, while a guardian is an organ of a private individual and represents the latter in regard to property and personal rights, the Regent is an organ of the State and exercises sovereign powers. Moreover, the Regent is neither a curator nor a proxy. Rights according to public law do not admit of representation.

(B) *Imperial Governor (Taifu).*

Though Art. 26 of the *Imperial House Law* provides for an Imperial Governor, the Imperial Governor has no connection with sovereign powers, his exclusive function being to attend to matters relating to the bringing up and education of the Emperor. An Imperial Governor is nominated by the preceding Emperor. Should no such nomination have been made by the preceding Emperor, a Governor is appointed by the Regent with the advice of the Imperial Family Council and of the Privy Council. Neither the Regent nor any of his descendants can be appointed Imperial Governor. (*Imperial House Law Arts. 26-29.*)

(C) *Powers and Status of Regent.*

The Regent governs in place of the Emperor (*Constitution* Art. 17, 2) the only limitation being that specified in Art. 75 of the *Constitution*—namely, that no modification can be introduced into the *Constitution* or into the *Imperial House Law* during the time of a Regency. The Regent exercises not only supreme power but sovereign powers in general, therefore he must, like the Emperor, be regarded as sacred and inviolable.

(D) *Liability of Regent after Retirement.*

As to whether the Regent can be held responsible, after he

has ceased to be such, for acts done by him while Regent, certain jurists answer the question in the affirmative; but there being no provision in the Japanese *Constitution* concerning this point, it would seem proper to conclude that he cannot be held responsible for such acts.

(E) *Qualifications of Regent.*

To qualify as a Regent, a person must be (1) a member of the Imperial Family and (2) of full age. The *Kwōtaishi* (Imperial son and heir) and *Kwōtaison* (Imperial grandson and heir) attain majority at full 18 years of age as well as the Emperor, but the rest of the Imperial Family do so at full 20 years of age.

(F) *Order of Regency.*

The order in which a member of the Imperial Family becomes Regent is as follows (*Imperial House Law* Arts. 20-22):—

1. The *Kwōtaishi* (Imperial son and heir);
2. The *Kwōtaison* (Imperial grandson and heir);
3. If there is neither *Kwōtaishi* nor *Kwōtaison*, or if the *Kwōtaishi* or *Kwōtaison* is still a minor, a male member of the Imperial Family becomes Regent according to the order of succession to the throne;
4. The Empress;
5. The Empress Dowager;
6. The Grand Empress Dowager;
7. If there be none of the above, a female member of the Imperial Family becomes Regent according to the order of succession to the throne.

A female member of the Imperial Family who can become Regent must be (*Imperial House Law* Art. 23):—

- (a) One who is not yet married;
- (b) One who having been married to a member of the same family has lost her consort; or

- (c) One who having been married into another family has subsequently returned to the Imperial Family.

(G) *Changes in Order of Regency.*

In case one who, in regular course, should become Regent is prevented from so doing, the order of the Regency may be changed with the advice of the Imperial Family Council and of the Privy Council. If, on account of the minority of the nearest related member of the Imperial Family, or for some other cause, another member has assumed the Regency, the latter continues Regent even after the attainment of majority by the nearest related member or the cessation of the other cause, except when the said nearest related member is the *Kwōtaishi* or *Kwōtaison* (*Imperial House Law* Art. 24).

(H) *Termination of Regency.*

The causes for which the Regency is terminated are as follows :—

1. The death of the Emperor;
2. The death of the Regent;
3. When the Emperor attains his majority, or when the permanent obstacle by which he has been prevented from personally governing ceases (whether the obstacle has ceased or not—a question which cannot be so easily ascertained as the attainment of majority—being, it would seem, decided by the Imperial Family Council and the Privy Council);
4. When the Regent himself is prevented from acting by some obstacle, whether he is prevented from acting or not being decided also by the Imperial Family Council and the Privy Council (*Imperial House Law* Art. 25);
5. When the Regent who is a female is married (marriage being a cause terminating the Regency, a female Regent can enter into the marriage state only with the

- advice of the Imperial Family Council and the Privy Council);
6. A person next in order having become Regent because of the *Kwōtaishi* or *Kwōtaison* being in minority or prevented by some obstacle, the *Kwōtaishi* or *Kwōtaison* attains his majority or such obstacle ceases.

SECTION 5.

RIGHTS AND DUTIES OF SUBJECTS.

Subjects (*shinmin*) are the people in general of a State organized as a monarchy. Subjects have the right to receive protection from the State, while at the same time they are charged with the duty absolutely to submit to the State. The rights of subjects, as given in Chapter 2 of the Constitution, are :

1. Eligibility for civil and military appointments (Art. 19);
2. Liberty of residence and change of abode (Art. 22);
3. Liberty in regard to speech and publication (Art. 29);
4. Liberty in regard to public meetings and associations (Art. 29 and *Peace Police Law*);
5. Right to present petitions (Art. 30 and *Law of the Houses* Arts. 62-71);
6. Right of being tried by judges determined by law (Art. 24 and *Law of the Constitution of the Courts of Justice*);
7. Inviolability of domiciles and their freedom from search (Art. 25);
8. Secrecy of letters (Art. 26 and *Postal Law* Art. 44);
9. Right of not being arrested, detained, tried or punished, except according to law (Art. 23);
10. Inviolability of property rights (Art. 27);
11. Freedom of religious belief and worship (Art. 28).

The rights enumerated above are all subject to the limitations imposed by laws and ordinances in general, and in par-

ticular by the *Ordinance re the Proclamation of a State of Siege* (*Decree No. 36 of the year 1882*).

Generally speaking, the duties of subjects consist in absolutely submitting to the State and acting in conformity with regularly promulgated laws and ordinances. The duties, however, which are specially imposed by the Constitution upon subjects are two, namely, (3) the duty to serve in the Army and Navy (Art. 20) and (2) the duty to pay taxes (Art. 21).

SECTION 6.

MINISTERS OF STATE (*Kokumu Daijin*).

Art. 55 of the *Constitution* provides that the respective Ministers of State shall give their advice to the Emperor and be responsible to *him* for the same. Ministers of State being chief officials entrusted with the general control of affairs of state, there is nothing to prevent Ministers being appointed as the heads of the different branches or departments of the administration in addition to the Ministers of State. This is what is provided for in Art. 10 of the *Regulations for the Organization of the Cabinet* (*Imperial Ordinance No. 135 of the year 1889*) which rules that persons other than the Ministers of the different Departments may, according to the pleasure of the Emperor, be caused to participate in the deliberations of the Cabinet as Ministers of State. Ministers (*Daijin*) who do not participate in the deliberations of the Cabinet are not Ministers of State (*Kokumu Daijin*). Thus, the Keeper of the Privy Seal (*Nai-Daijin*) and the Minister of the Household (*Kunai-Daijin*) are not Ministers of State. The provision that the *respective* Ministers are responsible means that they are each severally and separately responsible—that is, they are responsible to the *Emperor* in whom all sovereign powers are vested and combined. As to the manner in which they are to answer or be held responsible for their acts, that is a matter to be decided by the will of the Emperor.

As to the form in which Ministers of State assume their re-

sponsibility, it is done by means of countersigning formal acts. It may be asked whether a Minister can refuse to countersign. Certain jurists hold that if the sovereign should act contrary to the Constitution, the act is not that of the sovereign *qua* sovereign, but of an individual person, and that though a Minister is charged with the duty of countersigning the acts of the sovereign, he is under no obligation whatsoever to countersign the acts of an individual person. In Japan this might easily become a vexed question owing to the excessive veneration in which the Emperor is held, and it is highly problematical whether any Minister of State would care to run counter to public opinion to the extent of setting himself up as a judge to decide whether any given act of the sovereign was contrary to the Constitution or not. The general trend of opinion is, that if a Minister were to decide such a question he would then be assuming to be possessed of power greater than that of the sovereign. Whether a certain act be contrary to the Constitution or not is, after all, a question of interpretation ; and conservative Japanese jurists hold that it is obviously clear that the highest right to interpret the Constitution vests in the sovereign. At the present stage of constitutional development in Japan these exalted views of the Emperor's prerogatives may be natural ; but it is questionable whether they are correct, because a Minister of State owes duties *both* to the sovereign *and* the people, and for a man in such a responsible position blindly to countersign acts of state as a part of his official routine can hardly be regarded as a dignified or correct constitutional proceeding.

SECTION 7.

THE PRIVY COUNCIL (*Sumitsu Komon*).

Art. 56 of the Constitution provides that the Privy Council shall, in accordance with the Regulations for the organization of the Privy Council, deliberate upon important matters of state, when consulted by the Emperor. The Privy Councillors differ

from the Ministers of State in that (1) they give their advice as a body and not severally and individually, and that (2) they give their advice not of their own motion but only when consulted by the Emperor.

Of the matters to be deliberated upon by the Privy Council, when consulted, the more important are as follows (*Regulations for the Organisation of the Privy Council* promulgated by Imperial Ordinance No. 22 of the year 1888):—

1. Matters placed under the competency of the Council by the Imperial House Law—for example, a change in the order of succession, the appointment of an Imperial Governor (when none has been nominated by the preceding Emperor), the removal of an Imperial Governor from his post, the inclusion of properties in the Imperial Hereditary Estates, the amendment of the Imperial House Law, etc.;
2. The naming of a new era;
3. Drafts of, and questions *re*, provisions of the Constitution and laws and Imperial Ordinances appertaining to the Constitution;
4. The proclamation of a state of siege under Art. 14 of the Constitution, and the issue of Imperial Ordinances under Arts. 8 and 70 of ditto and other Imperial Ordinances which contain penal provisions;
5. Treaties and engagements with foreign powers;
6. Matters relating to the amendment of the Regulations for the Organisation of the Privy Council and of Regulations for the Conduct of Affairs of the same;
7. Other matters on which the Council may from time to time be consulted.

SECTION 8.

THE IMPERIAL DIET (*Teikoku Gikwai*).

The Imperial Diet is an organ of the State. It is composed of two Houses, that is, the House of Peers and the House of

Representatives. The House of Peers (*Kizoku-In*) is, under the *Ordinance Concerning the House of Peers (Imperial Ordinance No. 11 of the year 1889)*, composed of the following persons, the President and Vice-President of the House being nominated by the Emperor for a term of *seven years* :—

1. Male members of the Imperial Family who have attained their majority ;
2. Peers including :
 - (a) All Princes and Marquises who are at least 25 years of age ; and
 - (b) Members of the orders of Counts, Viscounts and Barons, who, having reached the age of 25 years, have been elected by the members of their respective orders : these become members for a term of *seven years* ; but the number of such members cannot exceed *one-fifth* of the entire number of the respective orders of Counts, Viscounts and Barons. A peer (a) who is insane or weak-minded, (b) who having been adjudicated insolvent has not yet completely discharged his liabilities or (c) who is in detention or on bail because of a criminal charge pending against him is disqualified both as an elector and as an eligible person, while Shintō priests or functionaries, as well as all professional priests or teachers of religion, are qualified as electors but not as eligible persons.
3. Members nominated by the Emperor (the number of whom must not exceed the number of the members having titles of nobility) including :
 - (a) Persons of at least 30 years of age who have been nominated by the Emperor as members on account of meritorious services to the State or for erudition : these are members for life, but their number cannot exceed 125.

- (b) Members elected from among and by the highest tax-payers : one person is elected in each *Fu* and *Ken* from among and by the fifteen male inhabitants thereof of the age of thirty years or more, paying therein the highest amount of direct national taxes on land, industry or trade, and when the person so elected is subsequently nominated by the Emperor, he becomes a member for a term of *seven years* and does not forfeit his capacity as a member even though the amount of taxes paid by him may be reduced during the term of his office (Art. 6 of *Home Department Instruction No. 7* on 10th March, 1890). Highest tax-payers are disqualified as electors and as eligible persons (*Imperial Ordinance No. 79* of the year 1889, Arts. 47.) :—
- (1) If they are insane or weak-minded ;
 - (2) If they are deprived of civic rights or suspended from the enjoyment thereof ;
 - (3) If they have been condemned to imprisonment, and three years have not yet elapsed since the completion of the term or the pardon of the penalty ;
 - (4) If they have been condemned to penal servitude under the old law and three years have not yet elapsed since the completion of the term or the pardon of the penalty ;
 - (5) If they have been condemned to a penalty for gambling, and three years have not yet elapsed since the completion of the term or the pardon of the penalty ;
 - (6) If their rights as electors and as eligible persons are in a state of suspension because of an offence committed in regard to the election of members of the House of Representatives ;

- (7) If they are in active service in the Army or Navy ;
- (8) If they are in detention or on bail because of criminal charges brought against them, and judgments are not yet irrevocable ;
- (9) If they have committed an offence punishable as a delict in connection with the election of members from among and by themselves.

A member of the House of Peers who has been sentenced to imprisonment or a severer penalty, or adjudicated insolvent, is expelled by an Imperial order. A member against whom a vote of expulsion has been passed in the House by way of disciplinary punishment is dealt by the Emperor, on the matter being reported to him by the President of the House. A member who has been expelled cannot become a member again until nominated by the Emperor. Though members elected from among the orders of Counts, Viscounts and Barons, and those nominated by the Emperor, may resign from their post, the members of the Imperial Family and Princes and Marquises cannot do so, since there is no express provision permitting such a course.

The composition of the House of Representatives (*Shugi-In*) is determined by the *Law of Election of the Members of the House of Representatives*. In Japan, a system of restrictive election is adopted. None but a male subject of the Empire who has been paying a land tax of at least *ten yen* (£ 1 or \$ 5) or upwards (per year) for one year or longer previous to the drawing of the electoral list, or a direct national tax, other than land tax, of *ten yen* or upwards (per year), or a tax of *ten yen* or upwards (per year) consisting of land and other direct national taxes for two years or longer previous to the same date, and still continues to pay the same, is qualified as an elector. He must, moreover, be a person who has had his domicile in the electoral district for *one year* or more previous to the drawing up of the electoral list and still continues to have it. In the

case of a person who has succeeded to property by title of succession to a house, the amount paid on the property by his predecessor is regarded as having been paid by himself. It is further necessary for an elector to be of at least twenty-five years of age. Females do not enjoy the franchise.

Members of the House of Representatives are elected by the direct vote of the nation, and voting is done by secret ballot.

Persons eligible for membership must be male subjects of the Empire who are at least full thirty years of age.

Persons who have neither electoral nor eligible right are (*Law of Election of the Members of the House of Representatives*, Arts. 11-12) :—

1. Incompetent persons (*kinjisansha*) and quasi-incompetent persons (*jun-kinjisansha*) ;
2. Persons who have been adjudged bankrupt (*shindai-kagiri*) and have not yet completely discharged their liabilities, and those who have been adjudged insolvent (*kashi-bunsan*) or bankrupt (*hasan*) and for whose benefit judgment of rehabilitation has not yet become irrevocable ;
3. Persons who are deprived of civil rights and those who are suspended from the enjoyment thereof ;
4. Heads of families of the nobility ;
5. Military and naval men in active service, and military and naval men who have been called out to active service on account of war or any other emergency ;
6. Students and pupils of govermental, public and private schools.

Persons who have no eligible right are (*same Law*, Arts. 13-17) :—

1. Shintō priests, Buddhist priests, teachers of religion of all kinds and teachers of primary schools, and those who have not given up any of the above professions for three months or upwards ;

2. Government contractors and officers of juridical persons who chiefly act as contractors to the Government;
3. Government officials engaged in matters concerning elections and those otherwise employed (by the authorities) in the same; also those who have not ceased to be such for three months or upwards;
4. Officials of the Imperial Household Department, Judges, Public Procurators, the President and Councillors of the Court of Administrative Litigation, Auditors (of the Board of Audit), revenue officials, and police officials;
5. Members of prefectural assemblies (cannot, at the same time be members of the House of Representatives);
6. Those who are disqualified as eligible persons because of their commission of offences relating to elections;
7. Naturalized persons, children of naturalized persons who have become Japanese subjects, and those who have become adopted children or *nyūfu* to Japanese subjects. (*Law of Nationality*, Art. 16, No. 7).

Membership of the House of Representatives is terminated by (1) dissolution of the House of Representatives, (2) death of the member, (3) expulsion, (4) resignation, (5) maturity of the term of office, and (6) loss of qualifications.

Convocation (*shōshū*).—The Diet is regularly convoked each year (*Constitution* Art. 41). It is also extraordinarily convened (1) when urgent necessity arises and (2) within five months after the dissolution of the House of Representatives.

Opening and Debates (*kaikwai oyobi gijii*).—Members can act as such only when the Diet is opened. Even though the Diet is opened, no debate can be opened unless at least *one third* of the whole number of the members is present (*Constitution* Art. 46). Votes are taken in both Houses by absolute majority. In the case of a tie-vote, the President exercises the casting vote (*ditto* Art. 47). Though the deliberations of both Houses are as a rule, held in public, yet they may, according to a resolution

of the Houses, be held *in camera* (*ditto* Art. 48 and *Law of the Houses* Art. 37).

Closing (*heikwai*).—By this, the activities of the Diet are terminated by the Emperor in the exercise of his supreme power, so that, subsequent to the closing, no debate can be opened nor can any vote be taken. An exception to this effect of closing is found in the fact that, even when the Diet is not sitting, each House may, at the request of the government, or with the concurrence of the Government, cause a committee to continue the examination of bills (*Law of the Houses* Art. 25).

Prorogation (*teikwai*) denotes simply a suspension of debates by the supreme power of the Emperor. For what purpose the Diet is prorogued is a question of fact rather than of law. Art. 33, 1 of the *Law of the Houses* provides that the Government may at any time order the prorogation of either House for a period of not more than fifteen days.

Dissolution (*kaisan*) means to reduce the term of office of the members of the House of Representatives and deprive them of their capacity as such before the term is up. The House of Peers is never dissolved; when the House of Representatives is dissolved, the House of Peers is prorogued by operation of law (*Constitution* Art. 44, 2). Prorogation in such a case is, of course, of a different nature from prorogation under ordinary circumstances; and so when the House sits again, it does not resume the proceedings at the point where they were left at the time of the dissolution, but an entirely new debate is opened.

Adjournment (*kyūkwai*) is where either House suspends proceedings of its own motion. Adjournment differs from prorogation in three points, namely, (1) that while adjournment is effected by the Houses themselves of their own motion, the Houses are prorogued only by orders from the Emperor, (2) that in the case of adjournment the sitting of committees is permitted, but in the case of prorogation no meeting whatsoever can be held, and (3) that adjournment may be effected by either

House independently of the other, but prorogation must take place always in regard to both Houses.

Rights of the Houses (Gi-In no kenri).—These include (1) the right to consent to laws and the Budget, and to initiate projects of law, (2) the right to consent to emergency Imperial Ordinances (*kinkyū chokurei*) and also to expenditures unwarranted by the Budget, (3) the right to ask questions and demand reports from the Government, (4) the right to receive petitions (*seigwan*) from the people, (5) the right to present addresses to the Emperor, (7) the right to bring actions in respect to public libel or insult, (8) the right to investigate into the qualifications of members, (9) the right to make rules necessary for the internal management of the Houses, (11) the right to inflict disciplinary punishment upon members, (12) the right to permit furlough and resignation, (13) the right to consent to the intended arrest of members, etc.

Members' Rights (Gi-in no kenri).—These include (1) freedom of speech within the Houses, (2) freedom from arrest without the consent of the House of which they are members, except for flagrant offences or offences against the internal or external safety of the State, (3) the right to demand yearly allowances and travelling expenses, (4) the right to put questions to the Government, (5) the right to introduce subjects for discussion such as projects of law, intended addresses to the Emperor, representations to the Government, and (6) special rights conferred on them by special laws (*Law No. 28 of the year 1889*).

CHAPTER II.

THE LAW COURTS (*Saibansho*).

The Courts of Law are divided into two classes, namely, (1) Ordinary Courts and (2) Special Courts. Ordinary Courts operate in regard to persons and things in general, while special Courts operate only in regard to particular persons and things, Courts Martial, Courts of Administrative Litigation, Prize Courts, Consular Courts, Courts under the Korean Governor-General, Courts under the Formosan Governor-General and also under the Kwantung Governor-General are special Courts. When Art. 58, 2 of the *Constitution* provides that "no judge shall be deprived of his position unless by way of criminal judgment or disciplinary punishment," it has in view only judges of ordinary Courts which are constituted under the *Law of the Constitution of the Courts of Justice*. Regulations governing special Courts are provided by special laws (*Constitution* Arts. 60 and 61).

The ordinary Courts in Japan are divided into four classes, namely, (1) the Supreme Court (*Daishin-in*), (2) Courts of Appeal (*Kōso-in*), (3) District Courts (*Chihō-saibansho*) and (4) Local Courts (*Ku-saibansho*). Of these, the first three classes are of a collegiate system, that is to say, judgments are rendered according to the result of a conference of five judges in the case of the Supreme Court, and of three in the case of a Court of Appeal, and also in the case of a District Court. In a Local Court, judgments are rendered by a single judge.

The jurisdiction and competency of these several Courts may be briefly summarized as follows :—

I. LOCAL COURTS (*Ku-Saibansho*).

A. Civil Cases (*Law of the Constitution of the Courts of Justice* Art. 14);—

1. Claims for sums not exceeding *yen* 500 or for things of a value not exceeding *yen* 500;

2. The following actions without any regard to their value :
 (a) Actions arising between lessors and lessees in regard to the taking delivery, vacation, use, possession or repairs of dwelling houses or other buildings or any part thereof, or in regard to attachments by lessors of furniture or articles belonging to lessees ;
 (b) Actions relating only to boundaries of immovables ;
 (c) Actions relating to possession only ;
 (d) Actions arising between employers and employees in regard to contracts for hiring of services for a term of one year or less ;
 (e) Actions arising between travellers and keepers of inns or eating houses, or between travellers and carriers by land or water in regard to the following matters :—
 1. Board or lodging charges or the carriage of travellers or freight for luggage belonging to them ;
 2. Luggage, monies or valuable articles which have been left for protection in charge of keepers of inns or eating houses or carriers.

B. *Criminal cases (ditto Art. 16)* :—

1. Offences punishable with detention or police fine ;
2. Offences punishable with limited penal servitude or imprisonment or fine and in respect to which no preliminary examination has been made.

C. *Non-Contentious Matters (ditto Art. 15)* :—

1. Registration of relations of rights relating to immovables and ships ;
2. Commercial registration and registration of patents, designs and trade marks registered in the Patent Office ;

3. Non-Contentious matters in general with the exception of those which are specially excluded from the jurisdiction of Local Courts.

II. DISTRICT COURTS (*Chihō-Saibansho*).

A. Civil cases (*ditto* Art. 26):—

1. In first instance, all those cases which do not come within the competency of Local Courts or within the competency of Courts of Appeal;
2. In second instance, appeals from judgments of Local Courts and complaints against their rulings and orders.

B. Criminal cases (*ditto* Art. 27):—

1. In first instance, all those cases which do not come within the competency of Local Courts, or within the special competency of the Supreme Court (*vide* under SUPREME COURT);
2. In second instance, appeals from judgments of Local Courts and complaints against their rulings and orders.

C. Non-Contentious Matters (*ditto* Art. 29):—

Complaints against rulings and orders of Local Courts.

D. Bankruptcy cases in general (*ditto* Art. 28).

III. COURTS OF APPEAL (*Kōso-In*).

1. Appeals from judgments of District Courts in first instance;
2. Complaints against rulings and orders of District Courts in first instance;
3. Civil actions in first and second instances against members of the Imperial Family come within the competency of the Tōkyō Court of Appeal (*ditto* Arts. 37 and 38).

IV. SUPREME COURT (*Daishin-In*).1. *In final instance* :—

- (a) Appeals from judgments of District Courts and Courts of Appeal in second instance ;
- (b) Complaints against rulings and orders of District Courts in second instance and also against rulings and orders of Courts of Appeal ;

2. *In first and final instance* :—

Preliminary examination and judgment as to offences specified in Arts. 73, 75 and 77-79 of the Criminal Code,* and offences committed by members of the Imperial Family such as are punishable with imprisonment or a heavier penalty (*ditto* Art. 50).

CHAPTER III.

ADMINISTRATIVE LAW (*Gyōsei-hō*).

SECTION I.

INTRODUCTION.

Administration (*gyōsei*) is divided into two classes, namely, state administration and self-administration. State administration is that administration which the State causes various government offices to carry on, while self-administration is that administration which is carried on by certain bodies or organizations themselves whose personality is recognized by the State. Government offices (*kwanchō*) or administrative offices (*gyōsei-kwanchō*), are organs by which commands are enforced upon the people in virtue of the supreme power of the

* These are attempts on the life of the Emperor and other members of the Imperial Family, and offences against the internal safety of the State.

Emperor. These state offices or authorities are also called the "central authorities" (*chūō-kwancho*). The organs of central or state administration are the Cabinet (*Nai-kaku*), the Minister-President of State (*Naikaku Sōri-Daijin*), the Ministers of the different Departments (*kaku-shō Daijin*), the Governor-General of Formosa, the Governor-General of Kwantung, the Governor-General of Saghalien, the Governor-General of Korea, the Governors of various prefectures, the Governor of Hokkaidō, the headmen of districts, governors of islands, etc. Self-governing administrative bodies or local bodies (*chihō dantai*) are urban and rural prefectures (*Fu* and *Ken*), districts (*gun*), cities (*shi*), towns (*chō*) and villages (*son*). The component parts of a local body are (1) a certain definite area of territory and (2) the inhabitants thereof. The organs of these local bodies are prefectoral assemblies and councils, district assemblies and councils, municipal assemblies and councils, town assemblies and village assemblies. It should be noted that the distinction between central and local administration is not to be sought in whether the offices concerned are located in the capital or in the country, but in whether the administration is carried on by orders from the Government or by the power of local bodies themselves. In this way, both organs of central administration and organs of local administration are found in the capital as well as in various country districts.

SECTION 2.

CENTRAL ADMINISTRATION (*Chūō Gyōsei*).

SUB-SECTION 1.

OFFICIALS (*Kwanri*).

The organs by which the central administration is carried on are called government offices (*kwancho*), and persons who participate in the work of central administration in government offices are called government officials (*kwanri*). Officials owe

their position to the command of the State ; but the State cannot force individuals to be officials. Individuals are appointed officials and caused to attend to the business of administration only after inquiry has been made of them and it has been ascertained that they are willing to accept the appointment.

Officials must act conformably with the *Public Service Regulations* (*Kwanri Fukinmu Kiritsu*). In other words, they are bound to be faithful and diligent in the discharge of their duties (Art. 1) ; they must act according to the instructions of their respective chiefs in regard to all matters relating to their official duties (Art. 2) ; they are forbidden to receive presents or gifts in connection with their official duties (Art. 8) ; they must obtain the approval of the Emperor before accepting orders, marks of honour, salaries or gifts from the Sovereigns or Governments of foreign powers (ditto) ; they are forbidden to accept presents from officials who are subject to their control (Art. 10) ; neither they nor members of their houses may carry on trade without the permission of their respective chiefs (Art. 11) ; without the permission of their respective chiefs they may not attend to affairs other than their regular work for an additional salary (Art. 13) ; they may not be entertained at dinner, etc., by persons who undertake contract works for government offices or who attend to payments and receipts for government offices, business men in receipt of subsidies from the authorities, purveyors to the authorities, or those who enter into various contracts with government offices (Art. 9) ; without the permission of their respective chiefs, they may not leave their duties or the place of their official residence, nor may they become presidents or officers of business companies (Arts. 6 and 7) ; they are bound to keep official secrets (Art. 4), etc.

In so far as it does not interfere with their duties, officials may at the same time be members of the House of Representatives ; but this does not apply to officials of the Imperial Household Department, Judges, Public Procurators, the President and Councillors of the Court of Administrative Litigation, Auditors

(of the Board of Auditors), revenue officials and police officials. Officials of urban and rural prefectures (*Fu* and *Ken*) and of districts (*gun*), Public Procurators, police officials, and revenue officials cannot be members of local assemblies.

In case officials act in contravention of their duties, the result is threefold—namely, they are liable to disciplinary punishment, criminal sanction, and/or civil sanction. For particulars of procedure, kinds and organs of disciplinary punishment, etc., *vide* the *Ordinance Concerning the Disciplinary Punishment of Civil Officials*, the *Ordinance Concerning the Disciplinary Punishment of Officials of the Imperial Household*, the *Law Concerning the Disciplinary Punishment of Judges*, the *Ordinance Concerning Military Discipline*, the *Ordinance Concerning Naval Discipline*, etc., etc.; and for criminal sanction, *vide* the *Criminal Code*, the *Military Criminal Code*, the *Naval Criminal Code*, etc.

Opinions differ as to whether officials who have made unlawful dispositions and caused damage to private persons are under civil liability to pay compensation for such damage; but there being express provisions to that effect in the following cases only, they must be regarded as being under no such liability in other cases:—

1. *Code of Criminal Procedure*. Art. 17:—The accused, even if acquitted, may not claim any indemnity from judges, public procurators, court clerks, bailiffs, officers of judicial police, police constables, or gendarmes, unless they have intentionally caused him loss or have committed an offence specified in the Criminal Code.
2. *Law Concerning Family Registries* Art. 4:—In case a Registrar has, in the performance of his duties, caused damage to a person making notification or any other person, he is liable to pay indemnity therefor *only when it has been caused by bad faith or gross negligence on his part.*

3. *Law Concerning the Registration of Immovables* Art. 13 :—In case a registry official has, in the performance of his duties, caused damage to an applicant or any other person, he is liable to make such damage good, *only when it has been caused by bad faith or gross negligence on his part.*

Whether the State is bound to pay compensation for damage done to private persons by unlawful acts on the part of officials—its employees—is another question. Though Art. 715 of the Civil Code provides that a person who employs another for a certain business is bound to make compensation for any damage caused to a third party by the person employed in the execution of the business, yet the provisions of the Civil Code are not applicable to the relations between the State and officials ; and so it is not proper to consider the provision in question as sufficient ground for holding the Government liable to pay indemnity for the unlawful acts of its officials. But it goes without saying that the State is bound to pay indemnity in those cases where it is specially provided in law that it shall, as in the cases (*e.g.*) contemplated in Art. 33 of the *Postal Law* which reads :—

“ In regard to the handling of postal matters presented in accordance with fixed formalities, the postal authorities shall pay indemnity for damage done them in the following cases only :

1. When registered postal matters are lost ;
2. When parcel postal matters, or postal matters with their value duly specified on the face thereof, are lost or damaged ;
3. When documents for sums to be collected through the post are lost, or the loss of their validity is caused ;
4. When postal matters deliverable in exchange for the purchase money have been delivered without collecting the money.

The amount of indemnity shall be fixed according to the provisions of an Ordinance.”

SUB-SECTION 2.

THE CABINET AND VARIOUS DEPARTMENTS OF STATE.

The Cabinet (*Naikaku*) is organized of the Ministers of State. The Minister President of State (*Naikaku Sōri-Daijin*) as the head of the Ministers of State reports to the Emperor upon affairs of state and maintains unity among the different branches of the administration according to the pleasure of the Emperor. Matters which must invariably be submitted to the deliberations of the Cabinet are :—

1. Projected laws, the Budget and the final account ;
2. Treaties with foreign powers and important international conditions (agreements) ;
3. Provisions or rules as to the organization of offices and Imperial Ordinances relating to the enforcement of laws ;
4. Disputes between Departments about their respective competency ;
5. Petitions of subjects referred by the Emperor or forwarded from the Imperial Diet ;
6. Expenditures which exceed the appropriations set forth under the various heads of the Budget or which are not provided for in the Budget ;
7. Appointment and dismissal of officials of *chōku-nin* rank and local governors ;
8. Matters which have been presented by competent Ministers to the Minister President to be referred to the deliberations of the Cabinet ;
9. Matters relating to important military affairs or military ordinances which have been referred by the Emperor to the Cabinet ;
10. Decisions as to the expropriation and use of land.

The Minister President of State may stop or suspend dispositions or ordinances of the different branches of the adminis-

tration. He countersigns Imperial Ordinances relating to the administration in general and is also empowered to issue Cabinet Ordinances (*Kakurei*).

The various Departments embrace the Departments of Foreign Affairs (*Gwaimushō*), Home Affairs (*Naimushō*), Finance (*Ōkurashō*), the Army (*Rikugunshō*), the Navy (*Kai-gunkshō*), Justice (*Shihōshō*), Education (*Mombushō*), Agriculture and Commerce (*Nōshōmushō*) and Communications (*Teishinshō*). The Ministers of the different Departments superintend the affairs of their respective Departments and are responsible for the same. In case the Ministers desire to enact, alter or repeal laws and ordinances relating to the affairs in their respective charge, they are required to draw up plans and submit them to the discussion of the Cabinet. The Ministers may issue Departmental Ordinances (*Shōrei*) in regard to the affairs in their respective charge and provide therein (unless specially forbidden by law) penalties consisting of fines not exceeding twenty-five *yen* or imprisonment for a term not exceeding twenty-five days (*Imperial Ordinance No. 208 of the year 1890*). The Ministers of the different Departments control and supervise the Superintendent-General of the Metropolitan Police, the Governor of Hokkaidō and the Governors of various prefectures in regard to the affairs in their respective charge, and may issue directions and instructions to such officials. They may also annul or suspend orders issued and dispositions made by such officials, if they should be found contrary to laws and ordinances, prejudicial to the public interest, or in excess of their authority. The Ministers report to the Emperor, through the Minister President, in regard to the appointment and dismissal of officials of *sō-nin* rank, and to the conferment of ranks and decorations upon officials under them; while they decide, at their own discretion, on the appointment and dismissal of officials of *hannin* rank and downwards (*General Regulations re the Organisation of the Different Departments [Imperial Ordinance No. 122 of the year 1893]*).

SUB-SECTION 3.

LOCAL GOVERNMENT OFFICES (*Chihō Kwanchō*).

(1) *Government of Formosa* (*Imperial Ordinance No. 362* of the year 1897).—The Government of Formosa differs from common local government offices. It is a special government office governing Formosa and the Pescadores. The Governor-General has the command of the military and naval forces within the scope of his mandate and attends to all matters subject to the supervision of the Minister of Home Affairs. He has further power to issue, with the approval of the Emperor, legal ordinances (*ritsurei*) which take the place of laws in Formosa. The Governor-General may, if he should find it necessary for the maintenance of peace and order within his jurisdiction, employ military force, or cause the commander of the garrison or resident military officers to attend to matters of civil administration in addition to their regular duties. The Governor-General of Formosa is appointed from among full generals or admirals or lieutenant-generals or vice-admirals. He may, either *ex officio* or by special mandate, issue Government Ordinances (*Sōtoku-fu-rei*) and therein provide penalties consisting of imprisonment for a term not exceeding one year or fines not exceeding two hundred *yen*.

(2) *Urban and Rural Prefectures* (*Fu* and *Ken*). (*Imperial Ordinance No. 151* of the year 1913).—The prefectoral governor (*Fu* or *Ken-chiji*) enforces laws and ordinances and superintends administrative affairs within his jurisdiction, subject to the control and direction of the Minister of Home Affairs in regard to the whole of his duties, and of the Ministers of the different Departments in regard to the various branches of his affairs in the respective charge of the different Departments. The powers and duties of the prefectoral governor consist in looking after all affairs within his jurisdiction. For this purpose, two sections are established in each prefecture and each section is caused to attend to the particular set of affairs allotted to it. Should it be found necessary to employ military force or make military

arrangements, the prefectoral governor may communicate with the commandant of the competent division or brigade and request the despatch of troops.

The subsidiary organs of the prefectoral governor are chiefs of sections, directing officials, police superintendents, experts, school-inspectors, subordinates, police inspectors, assistant experts, interpreters, and assistant police inspectors.

The Governor has power to issue Prefectural Ordinances (*Fu-rei* or *Ken-rei*) and to control and supervise the officials under him, and to annul or suspend dispositions made or orders issued by headmen of districts (*gunchō*) and governors of islands (*tōshi*) under him, should they be contrary to laws and ordinances, prejudicial to the public interest or in excess of their authority. The Governor may also entrust headmen of districts and governors of islands with part of the affairs coming within his competency.

The headman of a district (*gunchō*), subject to the direction and control of the prefectoral governor, enforces laws and ordinances and looks after administrative affairs within his territorial jurisdiction and directs and controls the officials under him. In regard to administrative affairs, he also directs and controls the headmen of towns and villages within his district. The headman of a district may annul or suspend dispositions made or orders issued by the headmen of towns and villages within his district, if they should be found contrary to laws and ordinances, prejudicial to the public interest or exceeding their authority.

The headman of a district may issue district ordinances (*gunrei*) in regard to matters entrusted to him by laws and ordinances or by the prefectoral governor.

The governor of an island (*tōshi*) is on the same official plane with the headman of a district, the only difference being that, while one governs an island, the other governs a district; so what has been said about the headman of a district applies correspondingly to the governor of an island. It should be noted that the principal islands of which the Empire is composed

are divided up into prefectures and governed by a number of prefectural governors, and not by governors of islands, who are under the control of prefectural governors in the same manner as headmen of districts.

(3) *Government of Hokkaidō (Imperial Ordinance No. 159 of the year 1913).*—The Governor of Hokkaidō enforces laws and ordinances and superintends the reclamation and colonization of Hokkaidō and administrative affairs in his charge, subject, like prefectural governors, to the supervision of the Minister of Home Affairs in regard to the whole of his duties, and to the supervision of the Ministers of the various branches of affairs in the respective charge of the different Departments. Like prefectural governors, the Governor of Hokkaidō may issue Government Ordinances (*Chōrei*), demand the despatch of troops from the commandant of the competent division or brigade, annul or suspend dispositions made or orders issued by the chiefs of branch offices, should they be found contrary to laws and ordinances, prejudicial to the public interest, or in excess of their authority.

In order to attend to these affairs, there are six sections of officials in the Government of Hokkaidō. The subsidiary organs of the Governor of Hokkaidō are chiefs of sections, chiefs of branch offices, directing officials, police superintendents, experts, subordinates, school-inspectors, subordinates, police inspectors, assistant experts, interpreters, assistant police inspectors, etc.

(4) *Metropolitan Police Board (Regulations for the Organisation of the Metropolitan Police Board (Imperial Ordinance No. 149 of the year 1913).*—The Superintendent General of the Metropolitan Police (*Keishi Sōkan*) has, subject to the control and direction of the Minister of Home Affairs charge of the police and extinction and prevention of fires in the prefecture of Tokyo, and also sanitary affairs specially designated by the Minister of Home Affairs. He is also subject to the control of the Ministers of the different Departments in regard to police matters in the respective charge of the various Depart-

ments. The Superintendent-General may, either *ex officio* or by special mandate, issue *Metropolitan Police Board Ordinances* (*Keishichō-rei*) in regard to administrative affairs in his charge. In regard to affairs under his control, he directs and supervises the headmen of districts, governors of islands, mayors of cities, headmen of wards (in cities) and headmen of towns and villages within the prefecture of Tokyo.

The affairs of the Metropolitan Police Board are distributed among four sections, namely, (1) the *Police Section* dealing with police affairs in general and criminal matters, (2) the *Peace Section* dealing with architectural police, police *re* public morals, the control of dangerous goods, business police, traffic police, etc., (3) the *Health Section* dealing with sanitary police and sanitary matters and (4) the *Fire Section*, which is the headquarters of operations against fires and deals with matters relating to the extinction and prevention of fires and floods.

The Superintendent-General may annul or suspend dispositions made or orders issued by chiefs of police stations or branch police stations or governors of islands within the prefecture of Tokyo, should they be found contrary to laws and ordinances, prejudicial to the public interest, or in excess of their authority.

(5) *Government of Karafuto (Saghalien) Imperial Ordinance No. 33 of the year 1907*.—The Governor of Saghalien is usually appointed from among civilians; but a general officer who is the commander of the garrison on the island may also be appointed to the post. The Governor enforces laws and ordinances, and attends to administrative affairs in general within his jurisdiction, subject to the control and instructions of the Minister of Home Affairs; but in regard to affairs relating to posts, telegraphs and telephones, he is subject to the supervision of the Minister of Communications, while, in regard to affairs relating to banking and customs duties, he is controlled by the Minister of Finance. Should he find it necessary to employ military force in case of emergency, or to have military preparations made for defensive purposes, he may communicate with the Com-

mander of the Saghalien garrison and request the despatch of troops. He may also, either *ex officio* or by special mandate, issue Government Ordinances (*Chōrei*) and therein provide penalties consisting of penal servitude or imprisonment for a term not exceeding two months, or detention, or fines not exceeding 70 *yen*. Further, he may annul or suspend dispositions or orders made or issued by subordinate offices under his jurisdiction, should they be found contrary to laws and ordinances, prejudicial to the public interest, or in excess of their authority.

(6) *Government of Korea (Regulations for the Organization of the Government of Korea [Imperial Ordinance No. 354 of the year 1910]).*—The Government of Korea (*Chōsen Sōtoku-fu*) is headed by a Governor-General who is chosen from among full generals or admirals. He is subject to the direct control of the Emperor and, within the limits of his mandate, has the command of military and naval forces and looks after the defence of Korea.

The Governor-General may, either *ex officio* or by special mandate, issue Korean Government Ordinances (*Chōsen Sōtoku-fu Rei*) and therein provide penalties consisting of penal servitude or imprisonment for a term not exceeding one year, detention, fines not exceeding two hundred *yen*, or police fines.

The Governor-General may annul or suspend dispositions made, or orders issued, by government offices within his jurisdiction, should they be found contrary to laws and ordinances, prejudicial to the public interest, or in excess of their authority.

The Governor-General exercises supervision over the officials under him. While he has to report to the Emperor, through the Home Minister and Minister President of State, as regards the appointment and the dismissal of civil officials of *sō-nin* rank, he decides at his discretion upon the appointment and dismissal of civilians of *hannin* rank and downwards.

(7) *Government of Kwantung (Regulations for the Organization of the Kwantung Government [Imperial Ordinance No. 196 of the year 1906]).*—The Kwantung Government (*Kwantō*

Totoku-fu) is located in Kwantung province. The Governor-General of Kwantung has the control of Kwantung province and assumes responsibility for the protection and control of the railway lines in South Manchuria, and also for the supervision of the affairs of the South Manchurian Railway Company. In virtue of special mandate, the Governor-General has also charge of dealings with the Chinese local authorities and sees to the defence of the territory under his jurisdiction. The Governor-General of Kwantung is appointed from among full or lieutenant-generals.

He may employ military force, should it be found necessary to do so for the maintenance of peace and order within the territory under him, or for the protection and control of the railway lines.

Either *ex officio* or by special mandate, he may issue Government Ordinances (*Totoku-fu Rei*) and therein provide penalties consisting of imprisonment for a term not exceeding one year or fines not exceeding two hundred *yen*. In extraordinary circumstances requiring urgent attention, he may issue ordinances containing penalties exceeding those above specified; but in this case the approval of the Emperor must be applied for through the Minister of Foreign Affairs immediately after the issue thereof; and in case the Imperial approval is refused, it is necessary to forthwith publicly announce that the ordinances shall lose their effect for the future.

SUB-SECTION 3.

LOCAL ADMINISTRATION.

Local administration is carried on by local bodies, that is, by urban and rural prefectures (*fu* and *ken*), districts (*gun*), cities (*shi*), towns (*chō*) and villages (*son* or *mura*).

(A) *Urban and Rural Prefectures and Hokkaidō.*

(*Regulations for the Organisation of Prefectures* [Law No. 64 of the year 1899] and *Law Concerning the Hokkaidō Assembly* [Law No. 2 of the year 1901]).

Prefectures (*Fu* and *Ken*) are juridical persons and deal, subject to the supervision of the authorities and within the limits of laws and ordinances, with their own public affairs and also those affairs which appertain to them in accordance with laws and ordinances and custom. The organs of a prefecture are the prefectural assembly (*Fu-kwai* or *Ken-kwai*) and prefectural council (*Fu-sanji-kwai* or *Ken-sanji-kwai*). Persons who have the right to elect members of the prefectural assembly are those full citizens* of cities, towns and villages within the given prefecture who have the right to elect members of municipal, town or village assemblies, and who have been paying in the same prefecture a direct national tax of three *yen* or upwards (per year) for one year or more. Persons who are eligible for the membership of the prefectural assembly are those full citizens of cities, towns or villages within the prefecture who have the right to elect members of municipal, town or village assemblies, and who, moreover, have been paying in the same prefecture a direct national tax of ten *yen* or upwards (per year) for one year or more. In any case, however, (1) officials or salaried official employees of the prefecture, (2) public procurators, police officials and revenue officials, (3) Shintō and Buddhist priests and other teachers of religion, (4) teachers of primary schools and (5) persons who undertake contract works for the prefecture have no eligible right. If members of the House of Representatives desire to become members of a prefectural assembly, they must resign the membership of the House of Representatives.

The number of members of prefectural assemblies varies with the population of the prefectures. In the case of prefectures of which the population is less than 700,000 souls, the number of members is fixed at 70, to which number one is added per additional 50,000 souls in the case of prefectures with a population of not less than 700,000 and falling short of 1,000,000 souls or

* For the meaning of "full citizens" *vide* p. 164.

per additional 70,000 souls in the case of prefectures with a population of 1,000,000 or upwards.

The matters which are to be voted upon by the prefectoral assembly are as follows :—

1. The budget of annual revenue and expenditure ;
2. The final account ;
3. Matters relating to the imposition and collection of charges for use, fees, prefectoral taxes (tax supplementary to land tax, business tax, miscellaneous tax, house tax, household rate, etc.) and *corvée* and dues in kind, except those as to which there are special provisions in laws and ordinances ;
4. Matters relating to the disposition and purchase or other acquisition of immovables ;
5. Matters relating to the saving or storing up of monies or cereals, etc. and to the disposition of the same ;
6. The contracting of new obligations and waiving of rights other than those provided for in the annual budget ;
7. The manner of management of properties and structures except those as to which there are special provisions in laws and ordinances ;
8. Other matters which by laws and ordinances are placed within the competency of the prefectoral assembly.

The prefectoral council is composed of (1) the prefectoral governor, (2) two high officials of the prefecture appointed by the Minister of Home Affairs and (3) eight honorary councillors in the case of a *Fu* and six in the case of a *Ken*. The honorary councillors are elected by the prefectoral assembly from among its members.

The powers and duties of the prefectoral council are as follows:

1. To vote upon those matters which come within the competency of the prefectoral assembly but which have been entrusted by it to the council ;
2. To vote in the place of the prefectoral assembly upon

- matters which come within the competency of the prefectoral assembly, in case they require such urgent attention that the prefectoral governor thinks that the said assembly cannot be called in time;
3. To give advice to the prefectoral governor on matters which he intends to submit to the prefectoral assembly;
 4. To vote, within the limits of the resolutions of the prefectoral assembly, upon important matters relating to the management of properties and structures;
 5. To fix provisions relating to the execution of works undertaken at the cost of the prefecture, except those as to which there are special provisions in laws and ordinances;
 6. To decide upon matters relating to petitions (administrative), actions or amicable settlements in which the prefecture is concerned;
 7. Other matters which by laws and ordinances are placed within the competency of the prefectoral council.

A prefecture being a juridical person, as already mentioned, it can own properties and carry on its administration with the income from its properties. If the income from properties is not sufficient for the purpose, then, the prefecture may impose a prefectoral tax upon those who have fixed domiciles within its boundaries and those who are resident there for three months or upwards. Even upon those who have neither fixed domiciles nor temporary residences, it may impose a land tax, house tax, business tax, etc., if they own land, houses, etc., carry on business, or do certain specific acts within the prefecture. Other items of income to the prefecture are monies, labour or goods levied upon cities, towns and villages, subsidies from the national treasury, (non-criminal) fines, charges for use, indemnities for negligence, contributions, fees, prefectoral debentures, temporary loans, etc.

The administration of prefectures is placed under the

supervision of the Minister of Home Affairs, therefore the latter has the power to issue ordinances or make dispositions such as are necessary to the supervision of prefectoral administration, and to see that prefectoral administration is not carried on in a manner contrary to laws and ordinances or prejudicial to public welfare. Should he find items of expenditure improperly included in the budget, he may remove them. He may also dissolve a prefectoral assembly with the approval of the Emperor. Further, he has power to give or withhold permission in regard to the following matters :—

1. To dispose of, or make material alterations in, valuable articles for the purpose of science, fine art or history ;
2. To newly impose, increase or alter charges for use ;
3. To make contributions or grant subsidies ;
4. Matters relating to the disposition of immovables ;
5. The imposition of *corvée* or dues in kind ; but this does not apply in case of urgency ;
6. To fix or alter continuing expenditure ;
7. To set up a special account.

Prefectures must always obtain the permission of the Minister of Home Affairs and the Minister of Finance in respect to the following matters :—

1. To raise prefectoral loans and fix or alter the manner of raising the same, the rate of interest thereon, and the manner of repayment ; but this does not apply to temporary loans for the purpose of disbursements included in the Budget, which may be raised with the approval of the prefectoral council only ;
2. To impose a tax supplementary to the land tax which exceeds a third of the land tax, except where there are special provisions in laws and ordinances ;
3. To fix the amount to be defrayed by the prefecture in regard to sums, a percentage of which is to be subsidized by the authorities in accordance with laws and ordinances.

In Hokkaidō there is the Hokkaidō Assembly, which is composed of honorary members elected for a term of three years according to the *Law concerning the Hokkaidō Assembly* and the *Ordinance Concerning the Election of the Members of the Hokkaidō Assembly*. The Hokkaidō Assembly votes upon the local budget of annual revenue and the kinds and rates of local taxes only, unless otherwise specially provided by laws and Imperial Ordinances. Thus, the Hokkaidō Assembly is essentially a public self-governing body in financial matters only.

(B) *Districts (Gun or Kōri.)*

(*Law No. 65 of the year 1899.*)

The district is also a juridical person and deals, within the limits of laws and ordinances, with its own public affairs and also with matters which appertain to the district in accordance with laws and ordinances. The organs of the district are the district assembly (*gun-kwai*), and district council (*gun-sanji-kwai*). Only those full citizens of towns and villages within the district who have the right to elect members of town or village assemblies, and who, moreover, have been paying in the district a direct national tax of three *yen* or upwards (per year) for one year or more, have the right to elect members of the district assembly. Persons who are eligible for the membership of the district assembly must be qualified as follows:—

1. That they are full citizens of towns or villages within the district;
2. That they have the right to elect members of town or village assemblies;
3. That they have been paying in the district a direct national tax of five *yen* or upwards (per year) for one year or more.

But (1) officials or salaried official employees of the prefecture in which the district is situated, (2) officials and employees of the district, (3) public procurators, police officials and revenue

officials, (4) Shintō and Buddhist priests and other teachers of religion, (5) teachers of primary schools, (6) persons who undertake contract works for the district and officers of juridical persons which undertake contract works for the district, and (7) official employees concerned in the business of election and those who have ceased to be such for less than one month, are not eligible for the membership of the district assembly. The number of members of a district assembly varies between 15 and 30; but it may, with the permission of the Minister of Home Affairs, be increased up to 40. The matters which are to be voted upon by the district assembly are :—

1. The budget of annual revenue and expenditure ;
2. The final account ;
3. Matters relating to the imposition and collection of civil charges for use, fees, *corvée* and dues in kind, except those as to which there are special provisions in laws and ordinances ;
4. Matters relating to the disposition, purchase, or acquisition by other means, of immovables, and to the saving or storing up of monies, cereals, etc. and the disposition of the same ;
5. The waiving of rights and the contracting of new liabilities ;
6. Matters relating to the manner of management of properties and structures.

The district council (*gun-sanjū-kwai*) is composed of the headman of the district and five honorary councillors elected by the district assembly from among its members. The powers and duties of the district council are as follows :—

1. To vote upon those matters which come within the competency of the district assembly, but which have been entrusted by it to the Council ;
2. To vote, in the place of the district assembly, upon matters coming within the competency of the district assembly, when they require such urgent attention that

- the district headman thinks that the district assembly cannot be called in time ;
- 3. To give advice to the district headman in regard to proposals which he is going to submit to the district assembly ;
- 4. To vote, within the limits of the resolutions of the district assembly, on important matters relating to the management of properties and structures ;
- 5. To fix provisions relating to the execution of works undertaken at the cost of the district, except those as to which there are special provisions in laws and ordinances ;
- 6. To vote upon matters relating to petitions (administrative), actions, or amicable settlements in which the district is concerned ;
- 7. To examine into the accounts of the district ;
- 8. Other matters which by laws and ordinances are placed within the competency of the district council.

No direct tax is imposed by the district. The revenue of a district consists in (1) charges for use, (2) fees, (3) income from properties owned by the district, (4) subsidies or contributions from private individuals or organizations, (5) corvée and dues in kind, (6) distributed impositions upon towns and villages within the district, (7) temporary loans for the purpose of disbursements included in the budget, and (8) district loans raised for the purpose of disbursements calculated to promote the permanent good of the district, or in case of need because of natural calamity or accident.

(C) Cities, Towns and Villages.

(Regulations for the Organisation of Cities [Law No. 68, of the year 1911] and Regulations for the Organisation of Towns and Villages [Law No. 69, ditto]).

The component parts of a city (*shi*), town (*cho*) or village (*sou* or *mura*) (which organizations are all judicial

persons) are (1) a determinate area of territory and (2) the inhabitants thereof. By the term "inhabitants" is meant all persons who are domiciled in the given city, etc., with the exception of members of the Imperial family and persons who enjoy extraterritorial privileges. Inhabitants are, furthermore, classified into full citizens (or citizens or *kōmin*) and non-citizens (*hi-kōmin*). Citizens possess electoral and eligible rights in regard to the organs of a city, town or village. To be "citizens," persons must fulfil the following conditions (*Regulations for the Organization of Cities*, Art. 9 and *Regulations for the Organisation of Towns and Villages* Art. 7) :—

1. They must be Japanese subjects ;
2. They must have been inhabitants of the city, town or village for two years or upwards ;
3. They must be at least full twenty-five years of age ;
4. They must be capable of leading an independent livelihood ;
5. They must not have been condemned to penal servitude or imprisonment for a term of six years or to a heavier penalty ;
6. They must not be incompetent or quasi-incompetent persons ;
7. They must share in bearing the burdens imposed upon the city, town or village, and pay, in the same city, town or village, a land tax or a direct national tax of two *yen* or upwards (per annum) ;
8. Two years or upwards must have elapsed since they obtained relief out of public funds owing to poverty.

A city, town or village may enact regulations of its own. The organs of a city are the Municipal Assembly (*Shi-kwai*) and Municipal Council (*Shi-sanji-kwai*) and the Mayor; and the organ of a town or village, the Town or Village Assembly (*Chō-kwai* or *Son-kwai*) and the Town or Village Headman (*Chōchō* or *Sonchō*).

The number of members of the Municipal Assembly is

fixed at 30 in the case of a city of a population of less than 50,000 souls, 36 in the case of one of a population of not less than 50,000 and less than 150,000, 39 in the case of one of a population of not less than 150,000 and less than 200,000, 42 in the case of one of a population of not less than 200,000 and less than 300,000, and 45 in the case of one of a population of 300,000 or upwards, 3 being added to this number for each additional 100,000 in the case of one of a population exceeding 300,000, and for each additional 200,000 in the case of one of a population exceeding 500,000. But the number of members may be increased or reduced in virtue of the regulations of the given city itself.

The number of members of the town or village assembly is fixed at 8 in the case of a town or village of a population of less than 1,500; 12 in the case of one of a population of not less than 1,500 and less than 5,000, 18 in the case of one of a population of not less than 5,000 and less than 10,000, 24 in the case of one of a population of not less than 10,000 and less than 20,000, and 30 in the case of one of a population of 20,000 or upwards. The number of members may, however, be increased or reduced in virtue of the regulations of the given town or village.

As to the manner of electing the members of a municipal, town or village assembly, the electors are divided into three classes in the case of a city, and into two in the case of a town or village. In the case of a city, the highest payers (among the electors) of direct municipal taxes—who pay among them a third of the total amount of the said taxes paid by the whole of the electors—constitute electors of the first class; the next highest payers—who pay among themselves one half of the total amount of direct municipal taxes paid by the whole of the electors, less the amount paid by the first-class electors—constitute electors of the second class; while the rest of the electors are electors of the third class. Each class of electors severally elect a third of the fixed number of members. In the case of a

town or village, the highest payers of direct town or village taxes—who pay among themselves one half of the total amount of the said taxes paid by the whole of the electors—are electors of the first class, while the rest are electors of the second class, each class severally electing one half of the number of members of the town or village assembly.

Full citizens enjoy, as a rule, electoral and eligible rights in connection with the membership of the municipal, town or village assembly; but the following persons are not eligible for election:—

1. Officials or salaried official employees of the prefecture in which the city, town or village is situated;
 2. Salaried official employees of the city, town or village;
 3. Public procurators, police officials and revenue officials;
 4. Shintō and Buddhist priests and other teachers of religion;
 5. Teachers of primary schools;
 6. Other government officials in general (these must obtain the permission of their respective chiefs in order to become members);
 7. Persons who undertake contract works for the city, town or village, or their managers, or partners with unlimited liability, directors or managers of juridical persons which are chiefly engaged in doing such acts;
 8. Father and son or brothers cannot be members at the same time (when father and son or brothers are elected together, the one who has obtained the greatest number of votes is deemed to be the person elected, and in case of a "tie" of the two persons elected, the elder is accorded the preference);
 9. Persons who are fathers, sons or brothers to the mayor or headman or assistant mayor or headman of the city, town or village.
- The powers of the municipal, town or village assembly are as follows:

i. Matters to be voted upon by the assembly :—

- (1) Determination, alteration or repeal of the rules and regulations of the city, town or village ;
- (2) Matters relating to works or undertakings carried on at the cost of the city, town or village (except affairs specified in Art. 93* of the *Regulations for the Organisation of Cities* and Art. 77* of the *Regulations for the Organisation of Towns and Villages* and those which are specially provided for by laws and ordinances) ;
- (3) The budget of annual revenue and expenditure ;
- (4) Approval of the report on final accounts ;
- (5) Matters relating to the imposition and collection of charges for use, fees, subscriptions, municipal, town or village taxes, and *corvée* and dues in kind, except those as to which there are special provisions in laws and ordinances ;
- (6) Matters relating to the management, disposition and acquisition of immovables ;
- (7) Matters relating to the creation, management and disposition of foundation funds and reserve monies or cereals, etc. ;
- (8) Contracting of new obligations and waiving of rights other than those dealt with by the budget of annual revenue and expenditure ;
- (9) The method of management of properties and structures (except those which are specially provided for by laws and ordinances) ;
- (10) Matters relating to security for the good conduct and behaviour of officials of the city, town or village ;
- (11) Matters relating to petitions (administrative)

* These are affairs of the State, Prefecture and other public organisations which the city, town or village is by laws and ordinances required to attend to.

- actions and amicable settlements in which the city, town or village is concerned ;
- (12) Election of officials for the city, town or village ;
 - (13) Inspection of documents and accounts relating to the affairs of the city, town or village ;
 - (14) Investigation into the management of affairs, execution of its resolutions, and receipts and disbursements by means of demanding reports from the mayor or headman ;
 - (15) To submit opinions to the supervising authorities in regard to matters affecting the public interest of the city, town or village ;
 - (16) To submit opinions in answer to inquiries of the administrative authorities.

The Municipal Council (*Shi-sanji-kwai*) is composed of (1) the mayor, (2) assistant mayor (or mayors), and (3) six honorary councillors who are elected by the municipal assembly from among its members. The chief officials of a city are (1) the Mayor (*shichō*) (2) assistant Mayors (*joyaku*) and (3) municipal advisers (*shi-san-yo*). The mayor is recommended by the municipal assembly and appointed to the post with the approval of the Emperor, to whom the matter is reported by the Minister of Home Affairs. His term of office is four years. The assistant mayor is selected by the municipal assembly upon the recommendation of the mayor, or elected by the municipal assembly where no mayor is in existence, and his appointment is confirmed by the approval of the prefectural governor. His term of office is likewise four years. Municipal advisers are honorary functionaries. They are elected by the municipal assembly and confirmed in office by the approval of the Minister of Home Affairs. Honorary municipal advisers must be chosen from citizens of the city who possess electoral rights.

The powers of the municipal council are as follows :—

1. To vote upon those matters which fall under the com-

- petency of the municipal assembly but which have been entrusted by it to the council ;
2. To give advice to the mayor in regard to matters which he proposes to submit to the municipal assembly ;
 3. Other matters which, by laws and ordinances, fall under the competency of the municipal council.

The town or village headman (*chōchō* or *sonchō*) is elected by the town or village assembly and the election is confirmed by the approval of the prefectoral governor. His term of office is four years. The powers of the town or village headman are as follows :—

1. To draw up proposals in regard to matters to be voted upon by the town or village assembly and carry into execution the resolutions passed in the assembly ;
2. To manage properties and structures, or, in case a special manager is appointed for them, to supervise his duties ;
3. To order monies to be received and paid and supervise the accounts and receipts and disbursements ;
4. To keep in safe custody instruments and public documents and papers ;
5. To impose and collect charges for use, fees, subscriptions, town or village taxes, *corvée* and dues in kind in accordance with laws and ordinances and resolutions of the town or village assembly ;
6. Other matters which, by virtue of laws and ordinances are placed within the competency of the town or village headman.

The revenue of a city, town or village consists of (1) income from its properties, (2) charges for use, (3) fees, (4) (non-criminal) fines, (5) indemnities for negligence, (6) subscriptions, (7) municipal, town or village taxes, (8) *corvée* and dues in kind and (9) public loans. City, town or village taxes are to be levied only when the revenue from the six first mentioned sources prove insufficient — a point in which they differ from

other taxes. Persons who are liable to pay city, town or village taxes are :—

1. Inhabitants;
2. Residents for three months or upwards;
3. Owners of land, houses or things in the city, town or village;
4. Those who carry on business in the city, town or village.

Items of income which are exempted from the said liability are :—

1. Those specified in Art. 5 of the Income Tax Law, namely :—
 - (1) Salaries of military men while attached to the Army or Navy in active service;
 - (2) Allowances in aid of, and pensions for, the sick and wounded;
 - (3) Travelling expenses, educational funds and sums received by way of legal support;
 - (4) Income of juridical persons whose object is not that of profit-making;
 - (5) Temporary income which does not appertain to businesses for profit-making purposes;
 - (6) Income from properties, businesses or professions held or prosecuted in foreign countries or places where the Income Tax Law is not enforced (except income of juridical persons which have head offices in places where the said Law is enforced);
 - (7) Dividends, allotments or bonuses received from juridical persons on which income tax is imposed in accordance with the said Law.
2. Those* specified in Arts. 120, 121 and 128 of the

* Income from property or businesses held or carried on outside the city, temple buildings, buildings which are used by the State, prefecture, city, town, or village or other public organizations for public purposes, and persons as to whom special circumstances exist.

Regulations for the Organisation of Cities, and Art. 101 and Art. 108, 2 of the Regulations for the Organisation of Towns and Villages.

SECTION 4.

ADMINISTRATIVE ACTIONS AND PETITIONS.

An administrative action (*gyō-sei soshō*) is an action which is brought by the injured party when the *right* of an individual is injured by an illegal administrative disposition. The Court which deals with such actions is called the "Court of Administrative Litigation" (*Gyōsei Saibansho*).

Petition (*sogwan*) is a kind of petition for relief which is, in case the *interest* of an individual is injured by an improper administrative disposition, made by the injured party to a superior administrative office which has power to alter the dispositions made by the administrative office by which the objectionable act has been done. But petitions against dispositions made by a departmental Minister are always to be addressed to that Minister.

Ordinary petitions (*seigwan*) may be made in an informal manner; but petitions in this connection are required to be made in accordance with fixed formalities; that is to say, they are to be made in writing, and within sixty days from the date of the administrative dispositions against which they are made; and each petition must contain (1) a statement of the exact point of dissatisfaction, (2) the reason therefor, (3) the claim, (4) the social status, profession and age of the petitioner, and must further be signed and sealed by the petitioner.

Petition may be made in regard to the following matters unless otherwise provided in laws and ordinances (*Law Concerning Petitions* [Law No. 105 of the year 1890]):—

1. Matters relating to the imposition of taxes and fees;
2. Matters relating to dispositions for recovery of taxes in arrear;

3. Matters relating to the refusal or annulment of business licenses;
4. Matters relating to water-utility and public works (engineering);
5. Matters relating to the division between Government and private owned lots of land;
6. Matters relating to local police.

Matters relating to administrative actions are provided for by *Re Matters in respect to which Actions may be brought before the Court of Administrative Litigation* (*Law No. 106* of the year 1890) and the *Law Concerning Administrative Litigation* (*Law No. 48* of the year 1890).

Administrative action may be brought in respect to the following matters unless otherwise provided in laws and ordinances:—

1. Matters relating to the imposition of taxes and fees except customs duties;
2. Matters relating to dispositions for recovery of taxes in arrear;
3. Matters relating to the refusal or annulment of business licenses;
4. Matters relating to water-utility and public works (engineering);
5. Matters relating to the division between Government and private owned lots of land.

The Court of Administrative Litigation in Japan is a special court. There is only one court of this kind in the Empire, and it is located in Tokyo. Cases before it are tried only once, and no appeal is allowed against its judgments. Judgment is rendered according to resolutions passed by a majority vote in the conference of the President and Councillors forming in all an odd number of five or upwards.

Unless otherwise specially provided, administrative action can be brought only after a petition (*sogwan*) has been made to

a superior local administrative office and its decision has been obtained. But in regard to dispositions of the Ministers of the different Departments, offices under the direct control of the Cabinet, or local administrative offices of the highest grade, administrative actions can be brought without making a previous petition ; but in case petition is made to the Departments or the Cabinet, administrative action cannot be brought at the same time.

The Court of Administrative Litigation does not accept actions for damages. As for the execution of judgments of the Court of Administrative Litigation, it may be entrusted to ordinary Courts.

SECTION 5.

THE VARIOUS BRANCHES OF ADMINISTRATION.

SUB-SECTION I.

INTERNAL ADMINISTRATION.

Internal or domestic administration (*naimu-gyōsei*) has for its object the maintenance of public peace and order, the promotion of the welfare of the people and the prevention of danger to the public. The administrative authorities are entrusted with the exercise of the police power in accordance with the *Law Concerning Administrative Execution* (promulgated by Law No. 84 of the year 1900 and amended by Law No. 52 of the year 1910).

- (1) *Meetings and Associations* (*Law Concerning Peace Police*
[Law No. 36 of the year 1900]).

A meeting (*sūkurai*) is an assembly of two or more persons at a certain place for a common object otherwise than to meet the requirement of laws and ordinances. For the maintenance of public peace and order, out-of-door meetings are sometimes restricted, forbidden or dissolved. In order to hold an open-air meeting, it is necessary for the promoters to notify the competent authorities at least twelve hours previous to the time of

the meeting, stating the place and time, the line on which it is intended to move, and the object. In the case of political meetings, notification must be made by the promoters at least three hours previous to the opening. Within fifty days previous to an election of members of the House of Representatives, etc., however, meetings for the purpose of preparations for election or of persons who possess electoral rights may be held without sending in any notification to the authorities. Should speeches or debates in a meeting be found prejudicial to public peace and order or to good morals, they may be stopped; and in case persons present raise a disturbance and commotion, or commit violence, the police officials present may order them to withdraw.

As to what may be regarded as legal limitations on meetings in general, they are as follows :—

1. That no person may carry firearms or other weapons;
2. That no discussion may be indulged in with regard to matters relating to the preliminary examination of felonies or delicts, of which the proceedings are conducted *in camera*, and that no speech may be made of a tenor calculated to screen criminals or to praise, defend or incriminate persons criminally accused;
3. That, in case police officials are present, they must be accommodated with such seats as they may require.

An association (*kessha*) is a society of persons affiliated for the promotion of a definite object. Associations may be forbidden, if their object is illegal or if they are prejudicial to public order or to good morals. In the case of a political association, a chief manager or chief managers must be appointed. Within three days from the organization of an association, notification must be made to the police station having jurisdiction over the place of its office, setting forth the name and rules of the association, the location of its office and the name or names of its chief manager or managers. Even associations other than

political may be required to make such notification and placed under the same rules as political associations, should such course be deemed necessary for the purpose of maintaining order. Persons who are disqualified for joining political associations are as follows :—

1. Military and naval men on active service and those on the first and second reserve lists who are called out;
2. Police officials;
3. Shintō and Buddhist priests and other teachers of religion;
4. Teachers, students and pupils of schools;
5. Females;
6. Minors;
7. Persons who are deprived of civil rights or who are suspended from the enjoyment of the same;
8. Aliens.

(2) *Control of Arms and Weapons (Law Concerning Peace Police and Law Concerning Administrative Execution).*

The wearing of swords who was forbidden by *Dajōkwan* (Council of State) Decree No. 38 issued on 28th March, 1876, which ran to the following effect :—

“ Be it known that henceforth the wearing of swords is forbidden except in case of wearing full dress or in the cases of soldiers, police officials, etc. for whom there are fixed uniforms, and that should swords be worn in contravention of this order they shall be confiscated.”

In regard to persons who it is apprehended may commit violence, fighting, or any other act prejudicial to public peace, their weapons may be provisionally seized. Persons may also be forbidden to carry weapons, explosives or sword sticks, etc. in which weapons are concealed.

Guns and gunpowder for military purposes cannot be

manufactured except by persons who have obtained permission or a commission from the authorities. And in order to sell guns and gunpowder, it is necessary to obtain the permission of the administrative authorities. Guns and gunpowder cannot be dealt in by pedlars, nor is it permitted to sell them at street stalls, in markets, or out of doors. The administrative authorities may, according to necessity, forbid or restrain the import, export, transport or carrying of guns and gunpowder at any such time and place as they may determine. Persons who have acted contrary to ordinances relating to the prohibition of or restriction upon the delivery, transport or carrying of guns and gunpowder are liable to penal servitude or imprisonment for a term not exceeding one year or a fine of not exceeding three hundred yen (*Law No. 53 of the year 1910*).

(3) Bodily Restraints upon Specific Persons.

Against the following persons, the Superintendent-General of the Metropolitan Police and the Governors of Hokkaidō and various prefectures may serve premonitory orders (*yokai*) and inflict punishment on them, should such orders not be complied with (*Ordinance Concerning Premonitory Orders [Imperial Ordinance No. 11 of the year 1892]*) :—

1. Persons who have no fixed profession and who habitually indulge in violent language and actions ;
2. Persons who have disturbed or attempted to disturb meetings ;
3. Persons who have disturbed or attempted to disturb the freedom of others by interfering with their business acts ;
4. Persons who have, for the purpose of disturbing meetings or the business of others, employed those mentioned in 1, 2 and/or 3.

Necessary bodily restraint may be imposed on drunkards, idiots, would-be suicides or other persons who are deemed to need relief or protection. Arms, weapons and other objects

from which there are apprehensions of danger may be provisionally seized by the competent authorities. In case it is found that there is imminent danger to life, person or property, or that gambling or unlicensed prostitution is being committed, the premises concerned may be entered even against the will of the proprietors or dwellers. At any time during the hours when they are open to the public, competent officials may enter inns, eating-houses, restaurants or other houses or establishments where the public have access. In regard to women who have committed the offence of unlicensed prostitution, they may be subjected to medical examination, and, should it be found necessary, they may be placed in a hospital at the expense of the offenders themselves or of the persons who have acted as go-betweens in the affair. In case the offenders or go-betweens have not means sufficient to defray the expense, the latter may be defrayed out of the public funds of the prefecture, etc.

At public bath-houses, males and females of twelve years of age or upwards must not be allowed to bathe promiscuously (*Home Department Ordinance No. 25 of the year 1900*).

Licensed prostitutes (*shōgi*) may be subjected to compulsory medical examination. The same applies to women guilty of unlicensed prostitution and those who having been previously condemned for the same offence are still in the habit of practising unlicensed prostitution. Under urgent circumstances, mentally deranged persons may be temporarily placed under guard by the administrative authorities. Should it be found necessary, doctors nominated by the authorities may be caused to examine mentally deranged persons, or officials or doctors may be caused to make examination in connection with mentally deranged persons or to go and inspect houses, hospitals or other places where such persons reside (*Law Concerning the Protection of Mentally Deranged Persons [Law No. 3 of the year 1900]*).

Minors are forbidden to smoke (*Law against Smoking by Minors [Law No. 33 of the year 1900]*).

The persons specified below may be compulsorily required to enter reformatories (*Law Concerning Reformation* [Law No. 37 of the year 1900]) :—

1. Persons who, being not less than eight and under eighteen years of age, are conducting themselves, or about to conduct themselves, in an improper manner, and over whom there are no persons properly exercising paternal power, and whom local governors deem it necessary should be caused to enter reformatories ;
2. Persons under eighteen years of age in respect to whom the persons exercising parental power, or guardians, have applied for permission to place them in a reformatory, and in respect to whom the local governor deems such a course to be necessary ;
3. Persons who are to be placed in a house of correction with the permission of a Court.

(4) Publication.

Publication (*shuppan*) means to print documents and drawings by any means whatsoever and to sell or otherwise distribute the same. When a publication (*shuppan-butsu*) is to be issued, notification must, three days previous to the day of issue, be sent in to the Department of Home Affairs, accompanied with two copies of the said publication, and bearing the seals of the author or his successor and the publisher. It is forbidden to publish documents the aim of which is to screen criminals or to defend, praise or sympathize with persons who have been criminally condemned or against whom criminal actions are pending. Without the permission of the competent authorities, no publication can be made of unpublished official documents or minutes of discussions in government offices relating to diplomatic or military affairs or other secrets of government offices. Should published documents or drawings be found prejudicial to public peace and order or to good morals, the Minister of Home affairs may forbid the sale and distribution of the same and

seize the blocks and manuscripts thereof (*Publication Law*). As regards publication by subscription, further special provisions are contained in the *Law Concerning Publication by Subscription*.

When issuing a newspaper, notification must, within two weeks before the issue, be made to the Department of Home Affairs through the authorities governing the place of the issue. On the issue of each number, two copies must be sent in to the Department of Home Affairs, one to the competent local authorities, and one to the Public Procurators' Office attached to the competent Court. In case the insertion of a correction or refutation is required in regard to a statement made in the newspaper, it must be inserted; but in case such correction or refutation exceeds twice the length of the article complained about, the newspaper office may demand payment for the part in excess at its own advertisement rates. In case judgment is delivered in regard to a paragraph inserted in a newspaper, the whole text of the judgment must be published in the next issue of the paper. Articles calculated to screen criminals, etc. may not be published in newspapers any more than in the publications contemplated in the *Publication Law*. The Ministers of Foreign Affairs, the Army and the Navy may specially issue ordinances forbidding the insertion of paragraphs relating to diplomatic and military affairs. In case an action for libel is brought in connection with a paragraph inserted in a newspaper, if the Court finds that it was inserted without any malicious intention to injure the plaintiff but solely for the purpose of promoting public welfare, the accused is permitted to prove the truth of the fact published, and when this is proved to the satisfaction of the Court, he is relieved from the liability for libel; but this does not apply where the paragraph complained about relates to the *private conduct* (*shikō*) of the plaintiff. The same applies to actions for damages. In case an article which is prejudicial to order or peace or to good morals is inserted in a newspaper, the publisher and editor are liable to imprisonment for a

term of not exceeding six months or a fine not exceeding two hundred *yen*. In case of the insertion of an article which is derogatory to the dignity of the Imperial House, subversive of the established form of government, or prejudicial to the fundamental law of the State, the publisher, editor and printer are liable to imprisonment for a term not exceeding two years and a fine not exceeding three hundred *yen*. (*Law Concerning Newspapers*).

(5) *Control in Time of War and other Emergencies (Ordinance Concerning the Proclamation of a State of Siege)*.

A state of siege (*kaigen*) exists where, in time of war or some other emergency, the whole country, or a particular locality thereof, is placed under military guardianship for the purpose of maintaining peace and order. A state of siege is, as a rule, proclaimed by the Emperor. But when in time of war a garrison, barracks, fort, naval port, naval station, naval ship-building yard, etc. is suddenly invested or attacked by an enemy, the commanding officer at the given place may exceptionally proclaim a state of siege. It may also be proclaimed by the commander of an expedition, should it be found necessary to adopt such measure for strategical purposes. (For the effect and other details of a state of siege, *vide* the ordinance above mentioned.)

(6) *Sanitary Administration*.

Sanitary administration is classified into (1) health administration (*hoken gyōsei*) and (2) medical administration (*iryō gyōsei*). For the details of health administration, the reader is referred to the *Law Concerning the Prevention of Contagious Diseases*, *Law Concerning the Medical Inspection of Sea Ports*, *Rules for the Medical Inspection of Trains*, *Rules for the Medical Inspection of Ships*, *Vaccination Law*, *Rules for the Control of Articles of Food and Drink*, and other hygienically dan-

gerous Articles, Rules for the Control of Harmful Colouring Materials, Rules for the Control of the Business of Dairymen, Rules for the Control of the Business of Manufacturing or Dealing in Refreshing Drinks, Rules for the Control of the Business of Manufacturing or Dealing in Ice and Snow, Rules for the Control of Eating and Drinking Utensils, Rules for the Control of Artificial Sweets, Rules for the Control of Antiseptics for Articles of Food and Drink, Rules for the Control of Methyl, Law Concerning the Removal of Filth and Dust, Law Concerning Sewage Works, Rules for the Control of Cemeteries and Burials, Rules Concerning Burials for the Army, Ordinance Concerning Funerals and Mourning for the Navy, etc., etc., For the details of medical administration, see the *Law Concerning Doctors, Law Concerning Dentists, Rules Concerning Licenses for Veterinary Surgeons, Rules Concerning Wet-Nurses, Rules Concerning the Business of Manufacturing or Dealing in Drugs and the Handling of Drugs, Law Concerning Opium, etc., etc.*

(7) Communications.

Communications (*kōtsū*) may be (1) communication by land and (2) communication by water. Communication by water is effected chiefly by means of ships. Japanese ships are :

- (1) Ships owned by the Japanese Government or by Japanese public offices ;
- (2) Ships owned by Japanese subjects ;
- (3) Ships owned by commercial companies which have their principal offices in Japan and of which all the partners (in the case of ordinary partnerships), all the partners with unlimited liability (in the case of limited partnerships and joint-stock limited partnerships), or all the directors (in the case of joint-stock companies), are Japanese subjects ;
- (4) Ships owned by juridical persons which have their principal offices in Japan and all the representatives of which are Japanese subjects ;

- (5) Ships owned by limited partnerships formed in accordance with the provisions of the old Commercial Code of which all the partners are Japanese subjects.

Ships other than those of Japanese nationality cannot engage in the carriage of goods or passengers between Japanese ports (coasting trade). Should ships other than those of Japanese nationality hoist the national flag of Japan in order to pretend to the nationality to which they really do not belong, the shipmasters are liable to a fine of not less than one hundred *yen* and not exceeding one thousand *yen*, and in aggravating circumstances, the ships themselves are liable to confiscation. For the regulations concerning ships and for the control of mariners, see the *Law Concerning Ships*, *Law for the Encouragement of Shipbuilding*, *Regulations for Shipbuilding*, *Law Concerning the Inspection of Ships*, *Law Concerning Mariners*, *Disciplinary Law for Mariners*, *Law Concerning Pilots*, *Law for the Prevention of Collisions at Sea*, *Law for the Encouragement of Navigation*, *Law Concerning Rescues at Sea*, etc.

The organs of communication by land include railways, the telegraph, telephone, post, etc., which are regulated by such laws and regulations as the *Law Concerning the Construction of Railways*, *Law Concerning the Nationalisation of Railways*, *Law Concerning Private Railways*, *Law Concerning Railway Business*, *Postal Law*, *Telegraph Law*, *Rules Concerning the Telephone*, etc.

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Among other important laws relating to internal administration may be mentioned the *Law Concerning Forests*, *Law Concerning Breed Horses*, *Law Concerning Stockfarmers' Associations*, *Game Law*, *Law Concerning Fishing*, *Insurance Law*, *Law Concerning Arable Land*, *Law Concerning the Extermination and Prevention of Noxious Insects*, *Law for the Control of Manures*, *Law Concerning the Inspection of Silkworm Eggs*, *Mining Law*, *Law Concerning Chambers of Commerce*, *Law of Weights and Measures*, *Coinage Law*, *Factory Law*, etc.

SUB-SECTION 2.

MILITARY ADMINISTRATION (*Gummu Gyōsei*).(1) *The Military Service.*

The military service (*heieki*) is the duty of subjects in general to join the Army and the Navy in response to the call of the State (*Constitution Art. 20*).

Military service is of the following kinds :—

1. *Standing service* (*jōbi heieki*) which includes (1) active service and (2) first or active reserve service.
 - (1) *Active service* (*gen-eki*).—Male Japanese subjects enter upon active service on the attainment of full twenty years of age for a term of three years (or two years in the case of infantry) in regard to the Army, and four years in regard to the Navy. Persons who are seventeen years old and upwards may, however, exceptionally join the active service with the permission of the fathers or mothers who exercise parental power over them.
 - (2) *First (or active) reserve service* (*yobieki*).—Those who have gone through active service are placed on the first (or active) reserve list for a term of four years and four months in the case of the Army and three years in the case of the Navy. Those on the first reserve list are liable to be called out for exercise in service once a year for a term not exceeding sixty days and to respond to a roll-call once a year.
2. *Second reserve service* (*kōbi-eki*).—Those who have completed the standing service aforementioned are placed on the second reserve list for a term of ten years in the case of the Army and five years in the case of the Navy. They are bound to respond to calls in the same manner as those on the first reserve list.

3. *Supplementary reserve service (hojū-eki).*—Persons who have successfully passed the conscription examinations but who have not been required to join active service because of the limit set to the number of men fixed for active service are supplementary reservists (*hojū-hei*). Under ordinary circumstances, they are called out for the purpose of education for a term not exceeding 150 days. They also are liable to calls under special circumstances. The term of this service is twelve years and four months in the case of the Army and one year in the case of the Navy.
4. *National service (kokumin-eki).*—Persons who are not less than seventeen years and not more than forty years of age and who are not in any of the services mentioned above are placed on the national service list. National service is of the following two kinds:—
 - (1) *First national service (dai-ichi kokumin-eki).*—This consists of persons who have completed second reserve service or supplementary reserve service in the case of the Army and those who have completed second reserve service in the case of the Navy;
 - (2) *Second national service (dai-ni kokumin-eki).*—This consists of persons who are neither in active service, nor in any of the reserve services, nor in first national service, and who fall under any of the following numbers:
 1. Persons who by means of drawings have been excluded from supplementary reserve service;
 2. Persons who fall short of the regulation stature;
 3. Persons whose call was postponed because of sickness of such nature as rendered them incapable of service and who are still unfit to be called out the following year;
 4. Persons whose call was postponed because their

families could not maintain themselves if they were called, and in respect to whom the obstacle does not cease to exist even after the termination of three years;

5. Persons whose call was postponed, on account of their being abroad, until they attained thirty-two years of age.
5. Volunteers (*shigwan-hei*).—The kinds of volunteers are :—
 - (1) Persons who having attained full seventeen years of age voluntarily enter upon three years' service ;
 - (2) Volunteers for one year's service : persons who volunteer for this service must fulfil the following conditions :—
 1. That they are not less than seventeen years and not more than twenty-eight years of age ;
 2. That they are graduates of government schools or prefectural middle schools or persons who have successfully passed certain fixed examinations ;
 3. That they defray all necessary expenses ;
 4. That they have never been condemned to imprisonment or a heavier penalty or have never been punished for gambling ;
 - (3) Soldiers on active service for six weeks, to be which persons must possess the following qualifications :—
 1. That they are not less than seventeen years and not more than twenty-eight years of age ;
 2. That they are graduates of normal schools and occupy the position of teachers in Government or public primary schools ;
 - (4) Naval volunteers—these are persons who having

applied for permission to join the naval service have obtained such permission and been entered in the list of naval volunteers. To be naval volunteers, persons must possess the following qualifications :—

1. That they are not less than seventeen years and under twenty-one years of age as regards seamen and engine men, not less than seventeen and under twenty-six years of age as regards carpenters, medical orderlies or cooks, and not less than sixteen years and under nineteen years of age as regards aspirants for the military band ;
2. The following persons cannot volunteer for the Navy :—
 - a. Those who are on first or second reserve service of the Army ;
 - b. Those who come under Art. 28 of the Conscription Ordinance, that is, persons who on the ground of attempted evasion of service have been called out without the preliminary of drawing ;
 - c. Those who have been condemned to imprisonment or a heavier penalty or punished for gambling ;
 - d. The accused in criminal cases ;
 - e. Insolvents (*kashibunsansha*) or bankrupts (*hasansha*) who have not obtained rehabilitation or their successors ;
 - f. Those who having been adjudged insolvent (*shindai-kagiri*) have not completely performed their liabilities, or their successors.
3. The following persons cannot be taken into ser-

vice even though they offer themselves for the same :—

- a. Those who are physically unsatisfactory ;
- b. Those who are not of good conduct and behaviour ;
- c. Those who are illiterate (uneducated) ;
- d. Others who are at all unfit for the work of naval men.

Disabled or deformed persons are exempted from the duty to serve. For the following persons, the call is postponed (but persons for whom the call has been postponed must respond again to the call the following year) :—

1. Persons whose stature falls short of the required height ;
2. Persons who are sick or convalescent and are incapable of labour ;
3. Persons who are undergoing examination, or are under detention, for offences which under the old Criminal Code involve a deprivation of, or suspension from, the enjoyment of civil rights :
4. Persons whose families could not maintain themselves if they were called out.

Persons who are exempted from the call for service are :—

1. Persons who fall under No. 1 or 2 of the above and who are still unfit for service the following year ;
2. Persons who fall under No. 4 of the above, and in respect to whom the obstacle does not cease even after the expiration of three years.

Persons for whom the call is otherwise postponed are :—

1. In the case of persons who are students in government schools, prefectoral normal or middle schools, or schools which are found by the Minister of Education to be at least of the same grade as middle schools, the call is, on their application, postponed until they are full twenty-eight years old, after which they are

- liable to be called out without the preliminary of drawing;
2. For persons who are abroad (except in Korea, Russian Maritime Provinces, Russian Saghalien, China, Hong-kong and Macao) the call is, on their application, postponed until they are full thirty-two years old. Should, however, they return home before they are thirty-two years old, they are liable to be called out without the preliminary of drawing.

Officials who are employed in duties in respect to which others cannot be substituted for them, mayors and headmen, and treasurers of cities, towns and villages are not called out for exercises in service or for a roll-call, no matter whether they are on the second reserve list or on the supplementary reserve list. The same applies to members of assemblies organized by law, while the assemblies are sitting.

(2) *Military Burdens.*

Military burdens (*gunji futan*) are legal compulsory burdens which are charged upon individual persons to meet military necessity : they take the form either of pecuniary prestations or of limitations upon property rights.

1. *Requisition* (*chōhatsu*) (*Ordinance Concerning Requisitions*) is where, in time of peace or war, the military administrative authorities, in the exercise of the State's power of command, require the use or prestation of property or labour such as is necessary for military purposes.

2. *Limitations upon property* in the strategic zone.—The strategic zone (*yōsai-chitai*) is the limited tract of land around various defensive structures built for the purpose of national defence ; and limitations are imposed as regards property existing within such zone in order to ensure the effectiveness of the said defensive structures. Such limitations are imposed by law and not by administrative measures ; therefore the State never pays compensation to the owners of properties in regard

to which these limitations are imposed. For details of this matter, *vide* the *Law Concerning Strategic Zones*. Further, Art. 4 of the *Law Concerning the Protection of Military Secrets* provides that persons who have surveyed, sketched, or photographed naval stations, secondary naval stations, defended ports, forts, batteries, submarine stations, or other defensive structures built for the purpose of national defence, or taken notes of their condition, are liable to major imprisonment for a term of not less than one month and not exceeding three years, or a fine of not less than two yen and not exceeding three hundred yen.'

SUB-SECTION 3.

FINANCIAL ADMINISTRATION (*sainu gyōsei*).

The Budget (*yosan*) being valid only for the particular year in question, it must be revised year by year (*Constitution*, Art. 64). To this rule, however, there are two exceptions, namely :—

1. A continuing expenditure fund determined for a fixed number of years with the consent of the Imperial Diet to meet special requirements (*ditto*, Art. 68);
2. Expenditures of the Imperial House: to these, the consent of the Imperial Diet is not required except in case an increase thereof be found necessary (*ditto*, Art. 66).

When the Budget is not brought into actual existence, the Budget of the preceding year is again carried out (*ditto*, Art. 71).

The Budget has not the effect of law: it is enforced only in virtue of the Financial Law (*Kwaikei-Hō*).

The revenue of the State consists of (1) the income from national properties, (2) the income from business carried on by the State, (3) taxes, (4) fees, (5) charges for use, (6) fines, (7) police fines, and (8) national loans.

Taxes (sosei) are sums of money which are, for the pur-

pose of meeting the expenses of the State and in the exercise of the financial power of the State, collected by the State at a certain fixed rate, and that compulsorily and without any compensation whatever : they can be imposed only in virtue of law (*Constitution*, Art. 21 and Art. 62, 1). The duty to pay taxes, and the methods of the collection thereof, are provided by the *Law Concerning the Collection of National Taxes* (*Law No. 21* of the year 1897). In case payment is not made even after the expiration of the term fixed therefor, a notice urging payment is despatched ; and if payment is still not made, the property of the party bound to pay is attached, except the items of property mentioned below, which cannot be attached :—

1. Clothes, bedding, furniture and cooking utensils which are indispensable for the living of the defaulter and members of his family living with him ;
2. Food and fuel and charcoal for one month necessary to the defaulter and members of his family living with him ;
3. The legal seal and other seals which are necessary for professional purposes ;
4. Articles which are deemed necessary for religious service or worship, tombs and burial grounds ;
5. Genealogies and diaries and documents which are likewise necessary to the defaulter's family ;
6. Uniforms or ritual or sacerdotal robes which are professionally necessary ;
7. Decorations and other marks of honour ;
8. Books and tools which are necessary for the studies of the defaulter and members of his family living with him ;
9. Inventions and manuscripts not yet published.

The most important laws and ordinances relating to taxation are the *Regulations Concerning the Land Tax, Income Tax Law, Business Tax Law, Law Concerning Succession Taxes, Law Concerning Sake Manufacture Tax, Law Concerning the*

Beer Tax, Rules Concerning Soy Tax, Law Concerning Sugar Consumption Tax, Stamps Tax Law, Patent Medicine Tax Law, Law Concerning Customs Duties, Law Concerning Tax upon Bourses, Law Concerning Tonnage Dues, Law Concerning Extraordinary Special Taxes, Law Concerning Tax on Playing Cards, etc.

Charges for use (*shiyō-ryō*) consist of compensation which is levied upon private persons for their use of structures owned by the State. *Fees* (*tesuryō*) are compensation paid by private persons for some advantage which they are to receive at the hands of the State. The creation or modification of fees need not always be fixed by law (*Constitution*, Art. 62, 2). Moreover, though taxes are levied in view of the means of the parties bound to pay the same, such is not always the case with fees. Fees are collected from specific persons who require certain acts of the authorities or desire to make use of structures owned by the authorities; but taxes are levied upon persons in general.

National loans (*kokusai*) are obligations which are incurred by the state, when taxes and other items of income are insufficient to meet expenses. In order to raise national loans, or in order to enter into such contracts involving charges upon the National Treasury as are not included in the Budget, it is necessary to obtain the consent of the Imperial Diet (*Constitution* Art. 62, 3).

SUB-SECTION 4.

ADMINISTRATION OF FOREIGN AFFAIRS (*gwaimu gyōsei*.)

For details of this branch of the administration, students are referred to the *Regulations for the Organization of the Department of Foreign Affairs*, *Regulations for the Organization of Consuls*, *Rules Concerning the Duties of Consuls* (Imperial Ordinance No. 153 of the year 1900), *Regulations Concerning the Duties of Consuls* (Law No. 70 of the year 1899), Treaties re the duties of consuls, *Harbour Regulations of Open Ports*, *Rules Concerning Passports* (Foreign Department Ordinance No. 1 of the year 1907), etc.

CHAPTER IV.

THE CRIMINAL CODE.

(Law No. 45 of the year 1907.)

The *Criminal Code* (*Keihō*) is the principal law which provides for the punishment of offenders. Offences (*tsumi* or *hanzai*) are acts contrary to laws which provide for the imposition of penalties; therefore acts which do not constitute offences in one country and age (because no penalties are imposed in respect thereto) may constitute offences in another country and age, if penalties are inflicted on their account.

The subject (in a grammatical sense) of an offence is a person, that is, a natural person who possesses capacity for criminal responsibility. A juridical person possesses no such capacity. Persons under fourteen years of age, and insane persons, possess no capacity for responsibility, therefore they are not criminally punishable even though they may commit criminal acts. Acts of deaf mutes are either not punished, or are punished more mildly than the acts of ordinary persons. For acts committed by weak-minded persons, the penalty is invariably reduced. Juridical persons are amenable to punishment only in virtue of special provisions of the law.

Cases where criminal acts are not punishable besides the above are :—

(1) *When they are done in order to avert imminent danger.*
—This is provided in Art. 37 of the *Criminal Code* which reads : “With regard to acts performed, under the stress of unavoidable necessity, for the purpose of saving from imminent danger the life, person, liberty or property of oneself or another, if the injury occasioned by the said acts is not graver in degree than that which it was endeavoured to avoid, such acts are not punishable.”

(2) *When they are done in justifiable defence*, that is, under

the stress of unavoidable necessity when one's rights are improperly attacked by another.—The elements of justifiable defence (*seitō-bōei*) are as follows :—

- (a) That the attack is imminent ;
- (b) That the attack is illegal ;
- (c) That the attack is a harmful act ;
- (d) That the defensive act against the attack is done under the stress of unavoidable necessity—that is to say, because there is no time to enable one to resort to the protective power of the State.
- (3) *When they are done either in the exercise of the power of the State or in accordance with laws and ordinances ;*
- (4) *When they are done in the execution of one's lawful and proper business.*

The elements of formation of an offence are (1) that the perpetrator has acted with malicious intent, and (2) that the act is a criminal one. It is only in the case of accidental offences (as involuntary homicide) that criminal acts are punishable notwithstanding that they have been done without malicious intent.

Offences may be classified in various manners :—

(1) *Intentional offences (yūi-han) and unintentional offences (mui-han).*—Offences which have been committed with the knowledge of their being productive of a certain result are intentional or deliberate offences : while offences which have been committed by mistake are unintentional offences. Unintentional or accidental offences are punishable only in virtue of special provisions of the law (*Criminal Code*, Art. 38).

(2) *Positive offences (sakui-han) and negative offences (fu-sakui-han).*—Offences which consist in infractions of prohibitory provisions are positive offences (culpable actions), while offences which consist in disobedience to commands to do something are negative offences (culpable omissions). To kill or wound persons or rob them of property are positive offences, while to omit to pay taxes or to evade the duty to serve in the Army or Navy are negative offences. There are, however,

cases where the question of whether an omission constitutes an offence or not depends on who the person is who has omitted to act. To omit, for example, to rescue a child about to be drowned constitutes an offence in a father, brother, or any other person who is bound to exercise supervision over the child or a police constable, but not so in any other person.

3. *Consummated offences (kisui-han), non-consummated offences (misui-han) and abandoned offences (chūshi-han).*—A non-consummated offence is where a criminal act has been committed without being attended with the expected result; a consummated offence is where a criminal act has been attended with the expected result; and an abandoned offence is where the criminal himself has voluntarily prevented the act from being attended with the expected result. (*Criminal Code*, Arts. 43 and 44.) A non-consummated offence may be either (1) a commenced but not consummated offence (as when a person has been prevented from robbing another of goods because of his having been caught by a third person in the act), or (2) an executed but not consummated offence (as when a person has poisoned another but the poison has proved abortive because the latter has taken an antidote in time).

4. *Offences involving a single offender (tandoku-han) and offences involving two or more offenders (kyō-han).*—In the case of an offence involving two or more offenders, the offenders may sometimes be all principals (*sei-han*) and sometimes one or more of them may be accomplice (s) or instigators (s). An instigator (*kyōsasha*) is dealt with after the example of the principal offender; and a person who has instigated an accomplice (*jūhan*) is dealt with after the example of the accomplice. On an accomplice, the penalty for the principal offender is inflicted in a mitigated form.

5. *Independent offences (ichizai-han) and concurrent (united) offences (heigō-han).*—Independent offences are offences which are dealt with each independently of the other. Concurrent offences are offences which are dealt with unitedly. An offence

which has been committed before a penal judgment for another offence has become irrevocable constitutes a concurrent offence together with the other offence. An offence committed after a judgment for another offence committed by the same person has become irrevocable is an independent offence. If among concurrent offences one is punishable with death, perpetual penal servitude or perpetual imprisonment, the penalties for the other offences (with the exception of fines, police fines and confiscation) are not imposed. If among concurrent offences there are two or more offences punishable with limited penal servitude or limited imprisonment, the maximum term of penal servitude or imprisonment imposable for the concurrent offences is the maximum term of the penalty for the most serious of the offences increased by one-half; but it must not exceed the total of the maximum terms of the penalties inflictible for the several offences (*Criminal Code*, Art. 47).

6. *Instantaneous offences* (*sokusei-han*) and *continuous offences* (*keisoku-han*).—A continuous offence is an offence composed of a criminal act the commission of which is of some duration, as when a child is starved for several consecutive days. The offence contemplated in Art. 186 of the Code (that is, to make a regular practice of wagering or gambling) is also an offence of this kind. The period of prescription against public action against a continuous offence (and also against an offence composed of successive acts as mentioned below) commences to run on the day when the criminal act ceased (or when the last of the successive acts was committed).

7. *Offences consisting each of a single act* (*tankō-han*) and *offences consisting each of several successive acts* (*rensoku-han*).—In case several successive acts all constitute the same offence, such successive acts are dealt with as forming an offence (*Criminal Code*, Art. 55).

8. *Flagrant offences* (*genkō-han*) and *non-flagrant offences* (*hi-genkō-han*).—A flagrant offence is an offence that is discovered at the moment of committal or immediately after, while a

non-flagrant offence is one discovered some time after its committal (*Code of Criminal Procedure*; Art. 56 *et seq.*).

9. *Ordinary offences (futsū-han) and special offences (tokubetsu-han)*.—Ordinary offences are offences specified in the *Criminal Code* and special offences are those contemplated in special laws.

10. *Isolated offences (tan-han) and "repeated offences" (rui-han)*.—If a person who was condemned to penal servitude again commits, within two years from the day on which the execution of the penalty was completed or remitted, another offence punishable with limited penal servitude, such offence is regarded as a "repeated offence" and a heavier penalty than usual is inflicted in respect to the same (*Criminal Code*, Art. 56 *et seq.*).

A penalty (*kei* or *keibatsu*) is a measure by which the State, in accordance with the law, deprives an offender of some advantage which he legally enjoys, because of the offence he has committed. The classes of penalties are :—

1. *Principal penalties (shukei*, that is, penalties one or more of which must always be inflicted for an offence) :—

- (1) Death (*shikei*);
- (2) Penal servitude (*chōeki*), imprisonment (*kinko*) and detention (*kōryū*);
- (3) Fines (*bakkin*) and police fines (*kwaryō*).

2. *Supplementary penalty (fuka-kei*, that is, a penalty which is imposed together with some principal penalty).—There is only one penalty of this kind in Japan and that is confiscation (*bosshū*). The following objects may be confiscated, provided always that they belong to the offender himself :—

- (1) Objects which have constituted the criminal act;
- (2) Objects which have been used or intended to be used for the committal of the criminal act;
- (3) Objects originating from, or acquired by means of, the criminal act.

The causes for which power to impose a penalty is extinguished are as follows :—

- (1) *The death of the offender.*
- (2) *Amnesty (taisha).*—By amnesty, the effect of law in regard to an offence is extinguished by the supreme power of the Emperor, and so an offender who has been included in an amnesty is not only no longer liable to punishment but may commit another offence without being dealt with as being guilty of a “ repeated offence.”
- (3) *Special pardon (tokusha).*—By this, the offender is, by the supreme power of the Emperor, relieved from the penalty imposed on him by an irrevocable judgment; but it has not the effect of extinguishing the validity of the said judgment, and so if he should commit a certain offence again within a certain period of time, he will be dealt with as being guilty of a “ repeated offence.”
- (4) *Rehabilitation (fukken).*—This is another act of supreme power by which the offender is enabled to recover the capacity of which he has been deprived by a penal judgment. Thus, rehabilitation means the enjoyment of a privilege for the future, and it has no retroactive effect to efface the offence committed in the past.
- (5) *Prescription (jikō).*—This is the expiration of a certain time in virtue of which the offender is relieved from the execution of penalty. Prescription is acquired when the execution of the penalty has been evaded during the following respective terms, *calculated from the time when penal judgment became irrevocable* :—
 1. Thirty years for the death penalty ;
 2. Twenty years for perpetual penal servitude or perpetual imprisonment ;
 3. Fifteen years for limited penal servitude or limited

imprisonment* for a term of ten years or upwards, ten years for ditto for a term of three years or upwards, and five years for ditto for a term of less than three years;

4. Three years for fines;
5. One year for detention, police finest or confiscation.

There are cases where notwithstanding that a penal judgment has become irrevocable, the execution of the penalty is postponed. This is what is called a suspension of execution of penalty (*shikkō yūyo*, (*Criminal Code*, Art 25 et seq. and *Re Suspension of Execution of Penalties* [Law No. 70 of the year 1905] based on the Berenger model). When the following persons have been sentenced to penal servitude or imprisonment for a term of two years or less, the execution thereof may, according to the circumstances of their respective cases, be suspended during a period of time of not less than one year and not exceeding five years from the day on which judgment has become irrevocable (*Criminal Code*, Art. 25) :—

1. Persons who have never been previously condemned to imprisonment or a graver penalty;
2. Persons who, while they have been condemned to imprisonment or a graver penalty, have not been again condemned to imprisonment or a graver penalty during seven years from the day on which the execution of the penalty was either completed or remitted.

The sentence suspending the execution of the penalty is to be cancelled (*Criminal Code*, Art. 26) :—

1. If a further offence has been committed during the term of suspension and the offender has been condemned to imprisonment or a graver penalty;
2. If the offender has been condemned to imprisonment or

* Limited penal servitude or imprisonment is from 1 month to 15 years.

† A police or minor fine is from 10 sen upwards and under yen 20.

a graver penalty for another offence committed prior to the pronouncement of the sentence of suspension;

3. If (with the exception of the case mentioned in No. 2 of the preceding Article (that is, Art. 25 for which see above) it is discovered that the offender was, prior to the pronouncement of the sentence of suspension, condemned to imprisonment or a graver penalty for another offence.

When a sentence of suspension is cancelled, the term of the penalty is computed from the day on which the judgment of cancellation has become irrevocable. In case, however, the term of suspension has expired without the sentence being cancelled, the penal judgment becomes null and void (*Criminal Code*, Art. 27).

A suspension of execution is, either on the demand of the Public Procurator or *ex officio*, pronounced by the Court simultaneously with the penal judgment. Against a sentence of suspension, the Public Procurator may make an appeal.

If a person who has been condemned to penal servitude or imprisonment manifests an appearance of amendment, a ticket-of-leave may be granted by an administrative measure after the lapse of one third of the whole term in the case of limited penal servitude or limited imprisonment, or of ten years in the case of perpetual penal servitude or perpetual imprisonment. This is called "provisional liberation (*kari-shutsugoku*) (*vide Criminal Code*, Art. 28 *et seq.*).

Release on ticket-of-leave may be cancelled;

1. If the condemned has committed a further offence during the term of his liberation on a ticket-of-leave and been sentenced to a fine or a graver penalty;
2. If the condemned has been sentenced to a fine or a graver penalty for an offence committed prior to his liberation on a ticket-of-leave;
3. If the condemned having been condemned to a fine or a graver penalty for another offence prior to his libera-

tion on a ticket-of-leave, such penalty is to be executed ;

4. If the condemned contravenes the regulations for control of persons liberated on tickets of-leave.

As for the penalties which are inflicted for various offences, they are provided in Book 2 of the *Criminal Code* of which we must here necessarily content ourselves with reproducing merely the headings of the several chapters in order to give an idea of their contents :—

- Chapter 1. Offences against the Imperial House ;
- “ 2. Offences against the internal safety of the State ;
- “ 3. Offences against the external safety of the State.
- “ 4. Offences against national intercourse ;
- “ 5. Interference with the exercise of public functions ;
- “ 6. Escape (of prisoners) ;
- “ 7. Concealment of offenders and suppression and destruction of proofs of guilt ;
- “ 8. Riots and disturbances ;
- “ 9. Arson and accidental conflagration ;
- “ 10. Offences relating to inundations and water-utility ;
- “ 11. Destruction of and damage to means of communication ;
- “ 12. Violation of domicile ;
- “ 13. Betrayal of secrets ;
- “ 14. Offences relating to opium ;
- “ 15. Offences relating to drinking water ;
- “ 16. Counterfeiting of money ;
- “ 17. Forgery of instruments ;
- “ 18. Forgery of valuable securities ;
- “ 19. Forgery of seals ;
- “ 20. Perjury ;

- Chapter 21. False accusation ;
 ,, 22. Indecency, fornication and bigamy ;
 ,, 23. Gambling and lotteries ;
 ,, 24. Offences relating to places of religious worship and cemeteries ;
 ,, 25. Offences committed by public servants in the exercise of their functions ;
 ,, 26. Homicide ;
 ,, 27. Wounding ;
 ,, 28. Accidental homicide or wounding ;
 ,, 29. Abortion ;
 ,, 30. Abandonment (of children, the aged or sick) ;
 ,, 31. Illegal arrest and false imprisonment :
 ,, 32. Threats ;
 ,, 33. Abduction and kidnapping ;
 ,, 34. Libel ;
 ,, 35. Offences against credit and business ;
 ,, 36. Robbery and theft ;
 ,, 37. Fraud and blackmail ;
 ,, 38. Embezzlement and misappropriation ;
 ,, 39. Offences relating to stolen or otherwise ill-gotten goods :
 ,, 40. Injuries to, and concealment of, property.

An idea of the standards of punishment adopted may be gleaned from following resumé :—

(1) Attempt on the life of the Emperor, etc., capital punishment; *lèse majesté* or insult towards a member of the Imperial Family, penal servitude of from 2 months to 5 years.

(2) Insurrection, (ringleaders) capital punishment or perpetual imprisonment, (participants in conspiracy and commandants in the insurrectionary body) perpetual imprisonment or imprisonment of from 1 to 10 years, (ordinary followers) imprisonment of less than 3 years.

(3) Conspiring with a foreign power and causing the latter

to commence hostilities against the Empire or joining an enemy in fighting the Empire, capital punishment ; acting as a spy for an enemy, capital punishment or penal servitude—perpetual or for not less than 5 years.

(4) Violence or intimidation on a foreign sovereign or president sojourning in Japan, penal servitude of from 1 to 10 years : insult to the same, penal servitude not exceeding 3 years ; violence or intimidation on foreign diplomatic representatives, penal servitude not exceeding 3 years ; insult to the same, penal servitude not exceeding 2 years.

(5) Obstructing public officials in the discharge of their duties, penal servitude or imprisonment not exceeding 3 years ; breaking or destroying seals or marks of attachment (seizure) affixed by public officials, penal servitude not exceeding 2 years or a fine not exceeding *yen* 300.

(6) Escape (of a prisoner), penal servitude not exceeding 1 year.

(7) harbouring escaped prisoners or offenders, penal servitude not exceeding 2 years or a fine of not exceeding *yen* 200.

(8) Riot and disturbance, (ringleaders) penal servitude or imprisonment of from 1 to 10 years, (leaders and commandants) penal servitude or imprisonment of from 6 months to 7 years, (followers) a fine not exceeding *yen* 50.

(9) Arson committed against dwelling houses, capital punishment or penal servitude—perpetual or for not less than 5 years ; burning dwelling houses belonging to others by fault or negligence, a fine not exceeding *yen* 300.

(10) Causing an inundation to the destruction of, or damage to, dwelling houses, trains, etc., capital punishment or penal servitude perpetual or of not less than 3 years ; causing ditto by fault or negligence, a fine not exceeding *yen* 300.

(11) Destruction of, or obstruction of traffic on, a public road, water-way or bridge, limited penal servitude not exceeding 2 years or a fine not exceeding *yen* 200.

(12) Invasion of an inhabited or guarded house, etc., penal servitude not exceeding 3 years or a fine not exceeding *yen* 50.

(13) Opening of sealed letters, penal servitude not exceeding 1 year or a fine not exceeding *yen* 200 ; disclosure of secrets of clients by doctors, lawyers, etc., penal servitude not exceeding 6 months or a fine not exceeding *yen* 100.

(14) Importing, manufacturing or selling opium, penal servitude of from 6 months to 7 years ; importing, manufacturing or selling instruments for opium smoking, penal servitude of from 3 months to 5 years ; smoking opium, penal servitude not exceeding 3 years ; possessing opium or instruments for opium smoking, penal servitude not exceeding 1 year.

(15) Pollution of drinking water, penal servitude not exceeding 6 months or a fine not exceeding 50 *yen* ; pollution of drinking water supplied to the public by means of water works, penal servitude for 6 months to 7 years.

(16) Counterfeiting or altering current coins, paper money or bank-notes with intent to utter the same, penal servitude—perpetual or for not less than 3 years.

(17) Forgery of a public instrument with intent to utter the same, penal servitude of from 1 to 10 years ; forgery of a private instrument with intent to utter the same, penal servitude of from 3 months to 5 years.

(18) Forgery of valuable securities with intent to utter the same, penal servitude of from 3 months to 10 years.

(19) Forgery of the seal or signature of a public office or official with intent to utter the same, penal servitude of from 3 months to 5 years ; forgery of the seal or signature of a private person with intent to utter the same, penal servitude not exceeding 3 years.

(20) Perjury, penal servitude of from 3 months to 10 years.

(21) False accusation, ditto.

(22) Rape, limited penal servitude of not less than 2 years : adultery, penal servitude not exceeding 2 years ; bigamy, ditto.

(23) Gambling or betting, a fine not exceeding *yen* 1,000; habitual indulgence in gambling or betting, penal servitude not exceeding 3 years; issue of lottery tickets, penal servitude not exceeding 2 years or a fine not exceeding *yen* 3,000; acting as an agent in selling lottery tickets, penal servitude not exceeding 1 year or a fine not exceeding *yen* 2,000.

(24) Insulting act against a temple, church, etc., penal servitude or imprisonment not exceeding 6 months or a fine not exceeding *yen* 50; violation of interment, penal servitude not exceeding 2 years.

(25) Abuse of power by public officials so as to cause a person to do an act which he is not bound to do or hinder him from doing an act which he is entitled to do, penal servitude or imprisonment not exceeding 6 months; arrest or imprisonment of persons in abuse of power by judges, public procurators, police officials, etc., penal servitude or imprisonment of from 6 months to 7 years; violence towards, or ill-treatment of, accused persons by ditto in the exercise of their functions, penal servitude or imprisonment not exceeding 3 years; taking of bribes by public officials, penal servitude of from 1 to 10 years; delivering, offering or promising bribes to public officials, penal servitude not exceeding 3 years or a fine not exceeding *yen* 300.

(26) Homicide, capital punishment or penal servitude perpetual or of not less than 3 years.

(27) Wounding, penal servitude not exceeding 10 years or a fine not exceeding *yen* 500.

(28) Accidental wounding, a fine not exceeding *yen* 500; accidental homicide, a fine not exceeding *yen* 1,000.

(29) Abortion (effected by the woman herself), penal servitude not exceeding 1 year, (by another person at the request or with the consent of the woman) penal servitude not exceeding 2 years, (by a doctor, midwife, etc.) penal servitude of from 6 months to 5 years, (by another neither at the woman's request nor with her consent) penal servitude of from 6 months to 7 years.

(30) Desertion of a child, an aged or sick person, etc., penal servitude not exceeding 1 year, (when the offender is a person who is legally bound to protect such person) penal servitude of from 3 months to 5 years.

(31) Illegal arrest or imprisonment (by an ordinary person), penal servitude of from 3 months to 7 years.

(32) Threats, penal servitude not exceeding 1 year or a fine not exceeding *yen* 100.

(33) Abduction or kidnapping of a minor, penal servitude of from 3 months to 5 years ; ditto of a person with a view to profit, an indecent act or marriage, penal servitude of from 1 to 10 years ; ditto for the purpose of transporting him or her out of the Empire, limited penal servitude of not less than 2 years.

(34) Libel by a public exposure of facts, whether true or false, penal servitude or imprisonment not exceeding 1 year or a fine not exceeding *yen* 500 ; insult in public, detention or a police fine.

(35) Injuring or obstructing the credit or business of another by disseminating false reports or by means of fraudulent stratagems, penal servitude not exceeding 3 years or a fine not exceeding *yen* 1,000.

(36) Larceny, penal servitude not exceeding 10 years ; robbery, limited penal servitude of not less than 5 years, robbery and wounding or rape, penal servitude perpetual or of not less than 7 years ; robbery and homicide, capital punishment or perpetual penal servitude.

(37) Fraud, penal servitude not exceeding 10 years ; blackmail, ditto.

(38) Misappropriation of goods belonging to another and held in one's possession (not in the course of one's business), penal servitude not exceeding 5 years ; (in the course of one's business), penal servitude of from 1 to 10 years.

(39) Receipt of stolen goods, penal servitude not exceeding 3 years ; transmitting, receiving deposit of, buying, or acting

as intermediary in the disposal of, stolen goods, penal servitude not exceeding 10 years and a fine not exceeding *yen* 1,000.

(40) Destruction of documents for the use of a public office, penal servitude of from 3 months to 7 years; destruction of documents belonging to other (private) persons and affecting rights or duties, penal servitude not exceeding 5 years; destruction of buildings or ships belonging to another, penal servitude not exceeding 5 years; concealment of letters belonging to another, penal servitude or imprisonment not exceeding 6 months or a fine not exceeding *yen* 50.

CHAPTER V.

THE CIVIL CODE (*Mimpō*).

The *Civil Code* (which was promulgated on 27th April 1896 and enforced on and after 16th July, 1898) determines rules applicable to private laws in general. The provisions of the *Civil Code*, however, do not all partake of the nature of private law, for provisions partaking of the nature of public law are also included in the Code when they are so intimately connected with provisions of private law that one cannot be separated from the other, or when it is more convenient to insert them in the *Civil Code*.

The present *Civil Code* is compiled after the German model, and consists of five Books arranged in the following sequence, namely, (1) General Provisions, (2) Real Rights, (3) Obligations, (4) Relatives and (5) Succession.

SECTION I.

GENERAL PROVISIONS (*sōsoku*).

The constituent elements of a right (*kenri*) are (1) its subject (*shutai*) and (2) its object (*nokuteki*). The subjects of rights

are either natural or juridical persons, while the objects of rights are persons, things or acts of persons.

The acquisition, loss and alteration of rights are due to acts (intentional actions of persons) or events (phenomena which occur independently of the intention of persons). Acts of which the object is to create an effect recognized by private law are called "juristic acts" (*hōritsu-kōi*). Of all events, that which has most to do with the acquisition and loss of rights is the lapse of time. In the Book of General Provisions, therefore, provisions are included in regard to (1) natural persons, (2) juridical persons, (3) juristic acts, (4) periods (terms) and 5 prescription.

SUB-SECTION 1.

PERSONS OR NATURAL PERSONS (*hito* or *shizunjin*).

Though various restrictions are imposed in regard to public (civic) rights, private rights (*shiken*) are enjoyed by all persons. The enjoyment of private rights commences at birth (Art. 1) and ends at death.

Foreigners are also enabled to enjoy private rights, subject, however, to certain restrictions which are imposed (owing to the inherent conservatism of human nature, which fails to recognize the oneness of humanity !) by laws and ordinances or treaties (Art. 2).

Though all persons enjoy private rights, it does not follow that all persons are authorized to exercise the same. Persons who have not the legal capacity to do acts in the exercise of private rights are "incapacitated persons" (*mu-nōryokusha*). It should, however, be borne in mind that the provisions relating to incapacitated persons have not any interdictory meaning, but that they aim at the protection of such persons. In the *Civil Code*, there are four kinds of incapacitated persons, namely :—

1. *Minors* (*mi-scinen-sha*), that is, persons who are under twenty years of age. It is as a rule necessary for minors to obtain the consent of their legal representatives in order to do juristic acts.

2. *Incompetent persons (kinjisansha)*.—A person who is in an habitual state of unsound mind is adjudged incompetent by the Court on the application of (a) certain special person (s). A person in regard to whom such adjudication has been made is an "incompetent" person. For an incompetent person a guardian is appointed in order to protect him and manage his property, and represent him in juristic acts relating to property.

3. *Quasi-incompetent persons (jun-kinjisansha)*.—A person of weak intellect, or a deaf, dumb or blind person or a spendthrift is a "quasi-incompetent" person when he is adjudged so by the Court on the application of (a) certain specific person (s). A quasi-incompetent person must obtain the consent of the curator, under whose care he is placed, in order to do certain important acts relating to property (Art. 12).

4. *Married women (tsuma or sai)*.—Owing to a popular illusion, which is a relic of an unenlightened age and time, it is supposed to be necessary for the maintenance of order in a family, that a married woman should submit to the authority of her husband. It is therefore provided that in order to do certain specific acts (*vide* Art. 14) a married woman must obtain the permission of her husband.

In case any of the incapacitated persons mentioned above has done a juristic act, in the exercise of his or her discretion and in contravention of the provisions of the law, such act is not invalid but may be cancelled.*

The domicile (*jūsho*) is of great importance in respect of various legal relations. The principal place where a person lives is his domicile (Art. 21); and if his domicile is unknown, the place of his residence is regarded as his domicile (Art. 22). Under the present system, a person must always have a domicile, but never more than one.

When a person leaves his domicile or place of residence and there is no person to manage his property, it may engender

* *Vide* P. 214.

great loss not only to the owner or his heir but to national economy also. The Code, therefore, provides necessary arrangements for the management of property in such a predicament (Arts. 25 to 29).

In case a person is long absent and it is unknown whether he is alive or dead, it is not sufficient that there are arrangements for the management of his property ; but it is further necessary in the public interest that the legal position of the absentee should be settled and the legal relations of the persons interested in him with regard to property and relationship determined once for all. Hence the system of adjudication of disappearance (*shissō*). If it is uncertain for seven years (or three years under certain special circumstances, such as war, shipwreck, etc.) whether an absent person is alive or dead, an adjudication of disappearance is made by a Court on the application of any person interested. Such person is legally considered as having died at the expiration of the term above specified, and all legal relations in which he is involved are settled accordingly (Arts. 30-32).

SUB-SECTION 2.

JURIDICAL PERSONS (*hōjin*).

Juridical persons (*hōjin*) are organizations which are, by a fiction of law, regarded (to a certain extent) in the same light as natural persons. Juridical persons are classified into (1) public and (2) private juridical persons. Public juridical persons (*kōhōjin*) are a subject to be dealt with under public law and with which the *Civil Code* has nothing to do. Private juridical persons (*shihōjin*) are subdivided into (1) associations (*shadan* or aggregates of natural persons for certain common objects or ends) and (2) foundations (*zaidan* or aggregates of property for certain purposes—juridical persons created invariably for the promotion of the public good).

Private juridical persons may also be classified into (1) juri-

dical persons for the public good and (2) juridical persons for profit. The most important of juridical persons for profit are companies (*kwaisha*), the provisions relating to which are reserved entirely for the *Commercial Code*, so that the juridical persons with which the *Civil Code* is concerned are confined to juridical persons for the public good, for the Code further provides that associations for profit are to be governed by the provisions of the *Commercial Code* relating to companies.

Juridical persons are constituted in accordance with the provisions of the law and with the permission of the authorities. It is also necessary to determine their constitution by Articles of Association—*teikan* (in case of associations) or Acts of Endowment—*kifun-kōi* (in case of foundations).

A * juridical person thus created enjoys rights and is subject to duties in conformity with laws and ordinances within the scope of its object as determined by its Articles of Association or Act of Endowment. A juridical person must register certain particulars at the place of each office within two weeks from the date of creation (Arts 45 and 46).

A juridical person can act and operate only through natural persons. It must appoint one or more directors who represent the juridical person and attend to its affairs. Comprehensive as the authority of these directors is, and including as it does all matters coming within the scope of its object, it is usually necessary that they should be placed under the supervision of one or more inspectors, though it is within the discretion of each juridical person to decide whether an inspector should be appointed or not (Art. 59). An association has another organ in the general meeting (*sōkai*), that is, the general meeting of all its members, which is the highest organ by which the intention of the juridical person is determined (Arts. 60-65).

The business of a juridical person is subject to the supervision of the competent authorities. A juridical person loses its

existence by dissolution, of which the causes are specified in the law (Art. 68). When a juridical person is dissolved, its property goes to the persons designated by the Articles of Association or Act of Endowment. If no such designation has been made by the Articles of Association or Act of Endowment, the directors may, with the permission of the competent authorities and (in the case of an association) agreeably with the resolution of a general meeting, dispose of the property for an object similar to that of the juridical person. Property which is not disposed of in any of the ways above mentioned goes to the National Treasury (*Fiscus*).

In case a juridical person is dissolved, its pending business must be wound up,—that is, there must be a liquidation (*seisan*). For the purpose of liquidation, a dissolved juridical person is deemed to continue in existence until the conclusion of such liquidation.

With the exception of states, administrative divisions of states and commercial companies, and also of those specially recognized by law or treaty, foreign juridical persons are not recognized in Japan.

Foreign juridical persons recognized in Japan enjoy only the same rights as juridical persons of a similar nature formed in Japan; but they cannot enjoy rights such as cannot be enjoyed by foreigners generally, except otherwise specially provided in laws or treaties.

SUB-SECTION 3.

THINGS (*mono*)

Things (*mono*) in the sense of the Code are confined to *material* things, in order that "things" may be distinguished from rights and other immaterial things. In former days, human beings were also regarded as "things;" but such is not the case now. A thing must be something that has an independent existence; and so part of a thing is not a "thing."

The produce of a thing is called its fruits (*kuwajitsu*), which may be either natural or legal. The produce reaped from the use of a thing is "natural fruit," while money or something else which is received as compensation (consideration) for the use of things is "legal fruit." Natural fruits belong to the person who has the right of reaping them at the moment of their separation from the principal thing, while legal fruits are acquired according to the number of days of the period of time during which the right of reaping them exists (Art. 89).

SUB-SECTION 4.

Juristic Acts (hōritsu-kōi)

A juristic act is an expression of intention whose object is to create an effect recognized by private law. The elements of a juristic act are (1) that the party or parties have capacity, (2) that it has an object protected by the law and (3) that there is an expression of intention. To explain this in greater detail:—

(1) *Capacity (nōryoku)* means capacity of action, that is, the legal capacity to do the act in question.

(2) *Object protected by law (hōritsu no hogo-suru mokuteki)*.—What the nature of a juristic act should be is a matter which is, as a rule, left to the discretion of the party or parties concerned to decide; but juristic acts which have unlawful objects in view ought not to be protected by law. The Code, therefore, provides that a juristic act whose object is contrary to public order or good morals is void. It is hardly necessary to add that a juristic act is also void when its object is one which is expressly forbidden by law or ordinance.

(3) *Expression of intention (ishi-teyōji)*.—An intention produces no legal effect unless it is either expressly or impliedly expressed; and in case the intention and expression do not agree, a greater measure of importance is attached by the Japanese Code to the expression. The provisions of the Code as to cases where intention and expression are

not in accord with each other cover (1) cases of mental reservation (Art. 93), (2) cases of fictitious expression of intention (Art. 94), (3) cases of a mistake in the essential elements of the act (Art. 95) and (4) cases of fraud or compulsion (Art. 96).

As to the time when an expression of intention to another person takes effect, the principle laid down in the Code is that *inter absentes* an expression of intention takes effect when the notification thereof reaches the other party; but there are various exceptions to this rule.

Though juristic acts are usually done by the parties themselves, it is impossible for all sorts of acts to be invariably attended to by the parties themselves, therefore representation is permitted except in regard to certain specific acts.

Representation (*dairi*) is a legal relation in which an expression of intention made by one person (the representative) takes effect directly for or against another (the principal). Representation may be either legal or voluntary. Legal representation is a relation of representation which is called into being by operation of law or by order of a court. Voluntary representation is a relation of representation which is called into being by an expression of intention (mandate).

The authority of a legal representative is determined by the law to which the relation of representation owes its existence, while the authority of voluntary representatives is determined by their respective acts of authorization (powers of attorney). A representative whose authority is not thus specifically fixed possesses only authority to do (1) acts of preservation and (2) acts whose object is the utilization or improvement of things which form the subject-matter of representation, but within the limits of not changing their nature (Art. 103).

Powers of representation are extinguished by (1) the death (or dissolution) of the principal, (2) the death, "incompetency,"* or bankruptcy of the representative and (3) the termination of

* Vide P. 208.

the mandate (this latter only in case of voluntary representation).

An entirely void act never acquires validity; it does not become effective by ratification: but if the party concerned has ratified it knowing it to be void, he is deemed to have performed a new act (Art. 119).

A voidable act is an act which comes into legal existence and takes effect, but of which, owing to some defect or other, the effect can be extinguished as from the moment of the act. When a voidable act has been annulled, it is regarded as having been void *ab initio*. A voidable act is, however, deemed to be valid *ab initio* when it has been ratified; and it can no longer be annulled—that is, ratification in this case means the waiving of the right of cancellation.

A person making an expression of intention may restrict the legal effect of such expression of intention by (1) a condition or (2) a time-limit.

A condition (*jōken*) is a subjectively uncertain fact on which the validity of the juristic act (to which it is attached—that is, the taking effect or termination of the juristic act—is made to depend. A condition need not be a fact that is really and actually uncertain, and it suffices if it is a fact which, though certain in fact, is uncertain to the knowledge of the party or parties concerned. This is why a condition is said to be a *subjectively uncertain fact*.

A condition may be either (1) a condition precedent (*teishi-jōken*), that is, a condition on the fulfilment of which the given juristic act takes effect, or (2) a condition subsequent (*kaijō jōken*), that is, a condition on the fulfilment of which the given juristic act is to cease to be effective.

The effect of a conditional juristic act may be considered under two heads, namely; (1) the effect of the fulfilment of the condition and (2) the effect of the act while the condition is pending. (1). When the condition is fulfilled, the act becomes operative (if the condition is a condition precedent), or ceases to

be effective (if it is a condition subsequent) (Art. 127). (2) The effect of the act while the condition is pending is (a) that each party must not do anything calculated to impair or injure the advantages which the other party is to derive from the act upon the fulfilment of the condition (Art. 128), (b) that the rights and duties of the parties concerned can be disposed of, inherited, preserved or secured in accordance with the general provisions (Art. 129), and (c) that if the party to whose disadvantage the fulfilment of the condition would operate has intentionally prevented fulfilment of the condition, the other party may deem the condition as having been fulfilled (Art. 130).

A time-limit (*kigen*) is a point of time on which the realization or termination of the effect of a juristic act is made to depend and which is sure to arrive at some future time. A time-limit being sure to be reached, a juristic act subject to a time-limit takes effect at once at the moment of the act.

A time-limit may be either (1) a time of commencement (*shiki*)—that is, the time on the arrival of which the performance of the given juristic act can be demanded, or (2) a time of ending (*shūki*)—that is, the time on the arrival of which the effect of the given juristic act is terminated. A time-limit is legally presumed to be fixed for the benefit of the debtor, but the debtor cannot claim the benefit of time if he is adjudged bankrupt, etc. (Arts. 136 and 137).

SUB-SECTION 5.

PERIODS OR TERMS (*kikan*).

A period or term denotes a particular stated interval of time. Periods have an intimate connection with the acquisition and loss of rights in various cases. The Code, therefore, contains a chapter (Chapter 5) dealing with the manner in which days, weeks, months and years are to be calculated.

SUB-SECTION 6.

PRESCRIPTION (*jikō*).

Prescription (*jikō*) denotes the acquisition or extinction of *property rights* because of the expiration of time. Prescription may be either (1) acquisitive prescription (*shutoku jikō*) which means the acquisition of rights as the result of the possession of the things (on which the rights rest) or the exercise of the rights during a certain period, or extinctive prescription (*shōmeitsu jikō*) which means the extinction of rights because of their not being exercised during a certain period.

Prescription being the acquisition or loss of rights as the result of an expiration of time, it would be theoretically proper that rights should be acquired or lost on the expiration of a legally fixed period. But in practice this would involve considerable difficulty regarding the various complicated relations which might have arisen in regard to the rights in question between the beginning and end of the period. Agreeably, then, with the intention with which the prescription system has been recognized, it is specially provided that prescription is operative, that is, the rights are acquired or lost as from the first day of the period fixed for the completion thereof (Art. 144).

The benefit of prescription is enjoyed not only by the parties concerned but by their successors by any title whatsoever.

The Court can render no judgment on the ground of prescription, unless it is claimed by the party concerned (Art 145).

The benefit of prescription cannot be waived in advance (Art. 146), though there is nothing to prevent a person waiving the benefit of time that has elapsed or the benefit of prescription that has been completed.

The progress of prescription is interrupted by a demand, attachment, provisional attachment, provisional disposition, acknowledgment (legal causes) or interruption of possession (natural cause) or is suspended for a certain period in any of the

cases specified in Arts. 158-161. In case of an interruption of prescription, the benefit of time that has so far elapsed is lost and prescription commences to run entirely anew on the day when the cause for interruption ceases. In the case of suspension, however, prescription merely ceases to run during a certain period ; and so the benefit of time that elapsed prior to the happening of the cause for suspension is not lost, and it is to be added to the time that has elapsed subsequent to the cessation of the said cause, in order to determine whether the period of prescription has been completed or not. We have just seen that prescription is interrupted either by a legal or natural cause. An interruption of prescription (acquisitive prescription) by a natural cause has effect against the whole world ; but an interruption by a legal cause is effective only as between the parties concerned and their successors.

SECTION 2.

REAL RIGHTS (*bukken*).

Real rights are a kind of property right and rights directly to govern things, and which can be set up against persons in general. In contradistinction to obligations, which are rights against specific persons and are therefore called rights against persons (*taijin-ken*), real rights are called rights against the world (*taisei-ken*). As a result of its being a right that is directly exercised over a thing, a real right is attended with a preferential right and a right of pursuit. A preferential right (*yūsenken*) is a right to enforce the right (to which it is attached) upon the thing in preference over another right of the same or a different kind acquired subsequently over the thing ; while by a right of pursuit (*tsuikyū-ken*) the right in question can be exercised no matter into whose hands the thing may pass. A real right being a right that is exercised directly over a thing, it does not permit rights of other persons to exist within the limits of that right, so that persons who have acquired rights upon a thing subsequent

to a real right existing over the same only acquire rights upon the thing *minus* the value of the said real right.

The effect of real rights being extensive, it is of vital importance to the national economy that they should be properly regulated. After the example of other countries, certain kinds of real rights only are recognized and the origination of "real rights" other than those actually specified in the Civil Code and other laws is not permitted. The kinds of real rights that are at present recognized are the following :—

(1) *Possessory Rights (sen-yū-ken).*

Possessory rights are rights acquired by holding things with the intention of so doing on one's own account. For the purpose of possession (*sen-yū*), it suffices to hold things (the physical element) with the intention of so doing on one's own account (the mental element); and it is not necessary that one should be the real person entitled, nor that one should hold them with the intention of owning them. To hold things does not necessarily mean to hold them in one's own hand, but to really and actually exercise dominion over them to the exclusion of other persons. Like other rights, possessory rights can also be acquired through a representative.

Possessory rights being constituted of two elements (mental and physical), a transfer of them cannot take effect merely from an expression of intention of the parties; but it is necessary that there should be delivery. The only exceptional cases where the transfer of a possessory right takes place without delivery of the thing are (1) where the thing is already in the hands of the transferee and (2) where the thing being possessed by another person, the latter declares that it shall be held for the future on behalf of the transferee (his principal) (Arts. 182, 176, 183 and 184).

One point regarding the effect of possession which is worthy of special attention is that it has the effect of instantaneous prescription (if it is allowable to use such an expression), for Art.

192 of the Code provides that a person who peacefully and publicly commences the possession of a movable immediately acquires the rights exercised over the movable, if he acts in good faith and without fault. In view of the simple process by which movables are transferred, and the frequency of transactions in movables, it would render such transactions highly insecure, and be prejudicial to the development of productive industries and the progress of the State, if the persons entitled were allowed to exercise their rights even after the things have passed through various hands. Therefore, upon the fulfilment of certain conditions, the possessor of movables is regarded as the person entitled thereto. When a possessor restores the thing to the person entitled, he can require the latter to reimburse to him the sum spent for the preservation and improvement of the thing (Art. 196).

The effect of a possessory right consists of (1) certain favourable legal presumptions (that is, that the possessor is presumed to possess in good faith, peacefully and publicly, and with the intention of holding as owner (Art. 186) and that he is presumed to lawfully own the right exercised over the thing (Art. 188), (2) the acquisition of fruits (Arts. 189 and 190), (3) the acquisition of the rights exercised over the movable (Arts. 192-195) and (4) the right of possessory action (Arts. 197-202).

Possessory rights are extinguished by the loss of one or both of the two elements of possession already explained.

While possession is the right to hold things, it is likewise necessary to protect the possession of rights, that is, quasi-possession (*jun-sen-yū*). The Code, therefore, provides that the provisions relating to possession apply correspondingly where property rights are exercised with the intention of so doing on one's own account.

(2) *Ownership (shoyū-ken).*

Ownership is the right of freely using, receiving the profits of, and disposing of, its object. It is the most complete and

effective of real rights, governing as it does its object in all directions. But the scope of all rights being determined by law, it is a matter of course that ownership, too, can exist subject to the restrictions imposed by laws and ordinances, the more important of such restrictions being those specified in Arts. 208-238 (Art. 206).

The special ways in which ownership is acquired are (1) prior possession (the ownership of ownerless movables is acquired by possessing them with the intention of ownership), (2) finding of lost articles, (3) discovery of hidden treasure, and (4) adjunction (when a material thing is adjoined to or mixed up with another or work is applied to a material thing, the owner of the principal thing or the workman [as the case may be] acquires the ownership of the other thing or thing worked upon, subject of course to a liability for compensation) (Arts. 239-248).

A thing may be owned conjointly by two or more persons. This is a case of co-ownership (*kyōyū*). Instead of governing merely part of the thing, each co-owner is entitled to use the whole of the common property in proportion to his share (Art. 249). In order to harmonize the relations of dominion in which the several co-owners thus stand to the whole of the common property, the Code contains special provisions relating to co-ownership.

Co-ownership is a condition of things which is not best fitted for the utilization and improvement of property, and so, with a view to facilitate the termination of such a relation, the Code provides that each co-owner may at any time demand the partition of the common property, except in cases where the advantages of the property cannot be fully enjoyed if partitioned (Arts. 256 and 257). The partition of common property may be effected either by agreement among the co-owners (voluntary partition) or by the decision of a Court, if an agreement cannot be arrived at among the co-owners (judicial partition).

It should be noted, however, that the liability of the co-owners does not end with partition, but that each co-owner, in

proportion to his share, bears a responsibility of warranty (similar to that of a seller towards the buyer) with regard to the portions which the other co-owners have acquired by the partition (Art. 261).

(3) *Leases (Superficies and Emphyteusis).*

In the Code four kinds of leases (*shakuchi-ken*) are recognized, namely, (1) superficies (*chijō-ken*), (2) emphyteusis (*ei-kosaku-ken*), (3) rights of hiring (*chinshaku-ken*) and (4) rights of using (*shiyōshaku-ken*), of which the first two are real rights, while the latter two are obligations. It is for economic as well as historical considerations that some leases are treated as real rights and others as obligations. The leases with which we are here concerned are only superficies and emphyteusis.

Superficies (*chijō-ken*) is a right to use the land of another person for the purpose of owning thereon structures or trees and bamboos. Emphyteusis (*ei-kosaku-ken*) is a right to carry on agriculture or stockfarming on the land of another person in consideration of a rent. While the payment of a rent is essential to an emphyteusis, the payment or non-payment of a rent has nothing to do with the formation of a superficies ; but an emphyteusis can be created only for a period of not less than twenty years and not exceeding fifty years (Arts. 265, 270 and 278).

(3) *Servitudes (chieki-ken).*

Servitudes may be either (1) personal, that is, the use of the land of another person for the benefit of persons, or (2) territorial, that is, the use of ditto for the benefit of land. The servitudes contemplated in the Code are confined to servitudes of the latter class—that is, the use of the land of another person (*servient land* or *shōeki-chi*) for the benefit of one's own land (*dominant land* or *yōekichi*) in accordance with the object fixed by the act of creation. It should be noted that a servitude is invariably created by voluntary agreement. What may be

called "legal servitudes" are mentioned among the provisions dealing with the extent or limits of ownership (*vide* Arts. 208-238).

A servitude is accessory to the ownership of the dominant land and shares the same fate with that ownership.

A servitude is indivisible, that is, it is not permissible to cause part of it to be extinguished or to divide it up so as to make two or more servitudes (Arts. 282 and 284).

With regard to *irai-ken* (that is, a right to enter a forest owned by another person for the purpose of gathering the under-growth or dry grass in accordance with custom) which has not the nature of joint-ownership, the provisions relating to servitudes apply correspondingly (Art. 294); while as regards *irai-ken* partaking of the nature of joint-ownership, it is governed by the provisions relating to co-ownership as well as by the local custom of each district (Art. 263).

(4) *Material Security Rights (butsujō-tambo-ken).*

(*Liens, Preferential Rights, Pledges and Mortgages*).

Material security (*butsujō-tambo*) is the value of things which affords a guarantee for the enforcement of an obligation. Material security rights are real rights and so they imply the right of pursuit and preferential right. Material security rights are rights accessory to obligations and so they are extinguished upon the extinction of the principal obligations. Under the Japanese Civil Code, a material security right is indivisible—that is, the party entitled may exercise the right over the whole of the thing until full performance is obtained of the obligation which it secures (Arts. 296, 300, 350 and 372).

A material security right is accompanied with a right of subrogation upon things,—that is, when the material security has been transformed into money or other things, the security right can be exercised over such things instead of over the thing which has been originally furnished as security. This, however, does not apply to liens, inasmuch as a lien is a right merely to retain

the thing and not a right, as other security rights are, to obtain preferential performance out of the thing.

Material security rights are (1) liens, (2) preferential rights, (3) pledges and (4) mortgages.

(1) *Liens* (*ryūchi-ken*).—Lien is a right, on the part of a person possessing a thing belonging to another person, to retain the thing until performance is obtained of an obligation which has arisen in his favour in connection with the thing itself.

The lien-holder is, as already mentioned, entitled merely to retain the thing until performance is obtained, but has no right whatever to obtain performance out of the thing in preference over other creditors; but this is not the case with the fruits proceeding from the thing retained, which he can appropriate to the performance of his obligation in preference over other creditors.

In order that a possessor of a thing belonging to another person may enjoy the protection of the law as lien-holder, it is necessary (1) that the obligation in his favour be one that has arisen in connection with the thing, (2) that the obligation is due, and (3) that the possession was not commenced by an unlawful act (Art. 295). The rights of the lien-holder are (1) the right to retain the thing until performance is obtained of the whole of the obligation, (2) the right to appropriate the fruits to the performance of the obligation and (3) the right to obtain reimbursement of such necessary and beneficial expenses as he has defrayed in connection with the thing retained (Arts. 297 and 299.)

(2) *Preferential rights* (*senshu-tokken*) are rights in virtue of which specified creditors are, in accordance with the law, entitled to obtain performance of their claims in preference over other creditors out of the whole property or specified property of the debtor. Preferential rights can come into existence only in virtue of the provisions of the law: they cannot be created by expressions of intention made by the individual parties.

Preferential rights are classified into two kinds according as

to whether they exist over the whole property or over certain specified property of the debtor ; and the latter class of preferential rights—that is, special preferential rights—are classified into (1) preferential rights in movables and (2) preferential rights in immovables. The kinds of preferential rights contemplated in the Code are :—

1. *General preferential rights (ippan no senshu-tokken).*

- (a) Preferential rights for expenses for the common benefit (as expenses of preservation) ;
- (b) Preferential rights for funeral expenses ;
- (c) Preferential rights for wages of employees ;
- (d) Preferential rights for supplies of daily necessities.

2. *Special preferential rights (tokubetsu no senshu-tokken).*

A. *Preferential rights in movables.*

- (a) Preferential rights for hiring of immovables ;
- (b) Preferential rights for lodging at an hotel or inn ;
- (c) Preferential rights for transportation of travellers or goods ;
- (d) Preferential rights for negligence of public officials in the performance of their functions ;
- (e) Preferential rights for preservation of movables ;
- (f) Preferential rights for sale of movables ;
- (g) Preferential rights for supply of seeds and saplings or manure ;
- (h) Preferential rights for agricultural and industrial labour.

B. *Preferential rights in immovables.*

- (a) Preferential rights for preservation of immovables ;
- (b) Preferential rights for works done upon immovables ;
- (c) Preferential rights for sale of immovables.

Over what thing or things, in what manner, and in what order, each of these preferential rights are exercised, and which

has the preference in case one of them conflicts with other security rights are provided in detail in the Code.

(3) *Pledges (pignus).*—A pledge (*shichiken*) is a right in virtue of which the creditor is enabled to obtain payment, in preference over other creditors, out of the thing which he has received either from the debtor or from a third person as security for his obligation.

A pledge is created only by a contract—a point in which it differs from a lien or a preferential right. The possession of the subject-matter is also essential to the formation of a pledge, and this is a point which distinguishes it from a preferential right and a mortgage. In order that a pledge may be set up against third persons, it is, in the case of a pledge of movables, necessary that the thing pledged should be continuously possessed; but in the case of a pledge of immovables, continuous possession is not essential, as in that case registration is obtained. Possession of the thing pledged need not be held always by the pledgee himself, but may be held by a representative; but the pledgor is not allowed to possess the thing on behalf of the pledgee. This is another point in which a pledge differs from a mortgage. The subject-matter of a pledge must always be a thing which is transferable. A pledge being a right which is accessory to an obligation, it would seem that it cannot be legally transferred separately from the principal obligation; but for the convenience of the pledgee, and agreeably to the custom hitherto prevailing, it is, on certain conditions, permitted to sub-pledge the thing pledged. Agreement as to the forfeiture of the thing pledged is forbidden by the law (though this does not apply to things given in pawn to pawnbrokers). Pledges are classified into (1) pledges of movables, (2) pledges of immovables and (3) pledges of rights. Pledges of rights are security rights consisting of the possession of property rights other than ownership (Art. 343 *et seq.*).

(4) *Mortgages (hypotheca).*—A mortgage (*teitō-ken*) is a right in virtue of which preferential payment of an obligation can be obtained out of immovables which have been furnished

as security for such obligation by the debtor or a third person *without transferring possession*. Like a pledge, a mortgage can only be created by an expression of intention of the party concerned. A mortgage extends to the things which have been joined to the mortgaged immovable and which form one body therewith, with the exception of the buildings standing on the mortgaged land and the fruits proceeding from the mortgaged immovable (whether land or buildings) (Arts. 370 and 371).

The mortgagee may dispose of his right of mortgage, that is, he may furnish it as security for another obligation or assign or waive it or its rank for the benefit of another creditor of the same debtor (Art. 375).

A third person who has acquired a real right to which a mortgage is attached must be prepared to be pursued by the mortgagee. In the interest of transactions in mortgaged immovables, therefore, the Code furnishes the acquirer of mortgaged immovables with two ways in which he may free the immovables from the pursuit of the mortgagee—"payment" and "removal." "Payment" (*bensai*) is where a third person who has bought the ownership or superficies in mortgaged immovables pays the price thereof to the mortgagee in compliance with the latter's demand. In this case, the mortgage is extinguished in favour of such third person. "Removal" (*dekijo*) is where a third person who has acquired the ownership, superficies or emphyteusis in mortgaged immovables purges the mortgage by paying the mortgagee a sum agreed to by the latter, or depositing the same in a Public Deposit Office (Arts. 377-378).

If a third person who has acquired a real right in mortgaged immovables does not remove the mortgage, and payment is not made by such person or by the debtor, the mortgagee may have the immovables sold at public auction.

So far as the debtor and mortgagor are concerned, a mortgage is not extinguished by prescription except simultaneously with the obligation which it secures. But if any other person has possessed the mortgaged immovables in such a manner as fulfils

the conditions requisite for acquisitive prescription, the mortgage is extinguished by prescription in his favour (Arts. 396 and 397).

SECTION 3.

OBLIGATIONS * (*Saiken* : *obligatio*).

An obligation (*saiken*) is a kind of property right to claim performance of a definite act (positive or negative). We have already seen that in order to distinguish them from real rights—rights against the whole world—, obligations are sometimes called rights against persons, in view of the fact that they are rights enforceable only against certain specific persons.

Obligations are rights from the view-point of creditors ; but they are duties from the view-point of the debtors. In the event of non-performance, the creditor may have resort to public authority and obtain compulsory performance and damages. The Code does not recognize obligations which are not accompanied by a right of action. The causes from which obligations arise may be generally classified into (1) juristic acts, (2) unjust enrichment, (3) unlawful acts (torts) and (4) direct provisions of the law. The most important of juristic acts by which obligations are called into existence are contracts. Unjust enrichment may be subdivided into (1) unjust enrichment pure and simple and (2) "business management." This gives a key to the arrangement of the Book of Obligations in the following manner : (1) General Provisions, (2) Contracts, (3) "Business Management" and (4) Unjust Enrichment. As for the said direct provisions of the law, they are scattered about in different laws and it is impossible to deal with them in a summarized form.

SUB-SECTION 1.

GENERAL PROVISIONS.

1. The subject of an obligation (*saiken no mokuteki*).—The

* Used in the sense of the Roman Law to mean the right of one party or the duty of the other.

subject of an obligation is an act which must fulfil the following conditions :

- (a) That it is possible ;
- (b) That it is not contrary to public order or to good morals ;
- (c) That it can be definitely fixed ;
- (d) That it gives the creditor an advantage which can be disposed of.

Failing the conditions (a) and (c), the act can have no binding force in fact ; failing the condition (b) public interest forbids that it should have binding force ; and failing the condition (d) the act may be the subject of another right, but not of an obligation.

We have just seen that it is necessary for the subject of an obligation to be an act which gives an advantage to the creditor ; but as to whether such advantage must always be something which can be valued in money, the Code (Art. 399) provides that even a thing which cannot be valued in money can be made the subject of an obligation.

Other provisions of the Code relating to the subject of obligations are about obligations of which the subject is the delivery of specific things, obligations the subject of which is the delivery of non-specific things, obligations of which the subject is a sum of money and alternative obligations (Arts. 400-411).

2. The effect of an obligation (saiken no kōryoku).—A creditor has the right to cause the debtor to perform his obligation. For the purpose of perfect performance, performance must be made at a certain time and place and according to the tenor of the obligation (Arts. 412 and 484).

Should the debtor fail to perform, the creditor may apply to the Court for compulsory performance and/or damages. As a rule, the effect of an obligation does not extend to third persons. The only cases where it exceptionally extends to a third person are (1) where an indirect action can be brought and (2) where a revocatory action can be brought. The right of indirect

or oblique action (*kansetsu soken*) is the right of the creditor to exercise, for the purpose of preserving the obligation in his favour, a right belonging to the debtor. The right of revocatory action (*haihi-soken*) is the right of the creditor to annul the act in case the debtor has done, in bad faith, an act prejudicial to the creditor, as when he has formally placed property of his own in the name of another person in order to evade execution (Arts. 423 and 424).

3. *Obligations with a plurality of parties* (*tasū tōjisha no saiken*). There may be two or more creditors or debtors in connection with one obligation. In such a case, unless there is a different expression of intention, the several creditors or the several debtors share the right or bear the duty in equal proportion. But this rule does not apply to the following obligations which are each of a peculiar nature :—

(a) *Indivisible obligations* (*fukabun-saiken*).—An indivisible obligation is an obligation the subject of which is, either from its nature or because of an expression of intention of the parties concerned, indivisible, as when "A" and "B" undertake to sell to "C" a motor car jointly owned by them. In case an obligation with a plurality of parties is also an indivisible one, performance can be neither made nor demanded piecemeal, and so it is provided that each creditor may demand performance on behalf of all the creditors, while each debtor may make performance to any creditor on behalf of all the debtors (Art. 428).

(b) *Joint obligations* (*rentai-saimu*).—A joint obligation is an obligation of which the creditor may demand total or partial performance either against any one or all of the debtors simultaneously or successively. By a joint obligation, an obligation is called into existence between the creditor and each debtor, while at the same time a certain relation is formed among the several debtors. But there being only one subject

common to all these obligations, if one of the debtors has performed, the obligation is extinguished in favour of all the debtors (Arts. 432, 433 and 445).

(c) *Suretyship* (*hoshō-saimu*).—Suretyship is an obligation to make the same prestation (as the debtor) to the creditor upon another obligation of another person, in case the latter does not make performance (Art. 446). The subject of a suretyship is, therefore, the same as that of the principal obligation. A surety's obligation includes interest, penalty for breach of contract, damages and other liabilities accessory to the principal obligation (Art. 447). A surety must, as a rule, be a person who fulfils the following conditions (Art. 450):—

- (1) That he has legal capacity to act;
- (2) That he is solvent (has means of payment);
- (3) That he has a domicile or temporary domicile within the jurisdiction of the Court of Appeal which has jurisdiction over the place of performance of the (principal) obligation.

A surety's obligation being accessory to the principal obligation, he is entitled to (1) the plea of demand and (2) the plea of discussion. The plea of demand (*sai-koku no kōben*) means that in case performance has been demanded of the surety immediately, instead of after it has been unsuccessfully demanded of the principal debtor, he (the surety) may require that performance be demanded of the principal debtor first; while the plea of discussion (*kensaku no kōben*) means that the surety may further insist upon execution being levied on the property of the debtor first. A surety sometimes bears an obligation jointly with the principal debtor, in which case he is entitled to neither of the said pleas. (Arts. 452-454.)

4. *The assignment of an obligation* (*saiken no yuzuri-*

watashi).—An obligation can be assigned except where its nature does not admit of assignment, or there is an expression of intention of the parties against it. In order that the assignment of an obligation may be set up against third persons, it is necessary that certain formalities should be observed (Art. 466 *et seq.*).

5. *The extinction of an obligation (saiken no shō-metsu)*.—An obligation is extinguished by any of the following causes, namely :—

(a) *Performance (bensai)*, that is, performance of the act which forms the subject of the obligation. To make, by way of performance, a different prestation from what was originally agreed upon is “substitute performance” (*daibutsu-bensai*: *datio in solutum*), and not regular performance; but when it is accepted by the creditor, it has the same effect as regular performance (Art. 482).

Performance is usually made by the debtor, but a third person may also perform in place of the debtor, except it is forbidden by the nature of the obligation or by a special expression of intention of the parties. In case a third person has performed in place of the debtor, he is subrogated into the position of the creditor and may exercise the obligation in so far as his claim for recourse goes. (Arts. 474, 499, 500 and 504.)

(b) *Set-off (sōsai: compensatio)*.—Set-off is where, two persons being entitled to obligations against each other which are of the same kind and which are both due, the obligations are caused mutually to extinguish each other in regard to the corresponding amount, instead of going through the roundabout process which the usual method of payment would involve. Set-off, however, does not take place in the natural course of things, but is effected by an expression of intention made by one of the parties to the other (505 and 506).

- (c) *Novation* (*kōkai*: *novatio*).—Novation is where an old obligation is extinguished by creating a new one in its stead. It is effected by making a contract changing the essential elements of an old obligation. The essential elements of an obligation are (1) the parties and (2) the subject. A novation, thus, takes effect where there is a change in the creditor, debtor or in the subject (Art. 513). It should, however, be noted that a novation differs from an assignment of an obligation, for by assignment the obligation in favour of the original creditor is passed over, as it is, to the new creditor, while by novation the old obligation is extinguished and a new one created instead.
- (d) *Release* (*menjō*).—Release is the waiving of an obligation by the creditor; and takes effect when the creditor expresses an intention to that effect to the debtor (Art. 519).
- (e) *Confusion or merger* (*kondō*: *confusio*).—Confusion means that in regard to one and the same obligation, the capacity of the creditor and the capacity of the debtor merge in the same person; and it is proper that in such case the obligation should be extinguished, inasmuch as one cannot well be creditor or debtor to oneself (Art. 520).

SUB-SECTION 2.

CONTRACTS (*keiyaku*).

(1) *Formation of a Contract* (*keiyaku no seiritsu*).

A contract (*keiyaku*) in the sense of the Japanese Code possesses a comprehensive meaning; the word applies to any agreement of two or more persons which is intended to produce an effect recognized by private law. Contracts are classified into unilateral contracts (*hemmu-keiyaku*) and bilateral contracts (*sōmu-keiyaku*), into contracts with consideration (*yūshō-*

keiyaku) and contracts without consideration (*mushō-keiyaku*), etc., etc.

To the formation of a contract, two things are essential, namely, (1) offer (*mōshi-komi*) and (2) acceptance (*shōdaku*). Though, in regard to expressions of intention *inter absentes*, the Code generally acts on the principle that they take effect upon receipt of the notice thereof by the other party, yet as regards the acceptance of offers of contracts, which are the most important of expressions of intention, it rules that *inter absentes* a contract comes into existence when the notice of acceptance is despatched (Art. 526).

(2) Effect of a Contract (*keiyaku no kōryoku*),

One of the parties to a bilateral contract may refuse to perform his obligation unless the other party tenders performance of his own obligation (Art. 533)—a fair provision which aims at guarding each party against damages arising from non-performance on the part of the other party.

As to which party must bear the loss in case of a bilateral contract, of which the subject is the creation or transfer of a real right in a *specific thing*, if such thing should have been lost or damaged by a cause not imputable to the debtor, this is a question which is differently solved in different countries; but the Japanese Code provides that the loss falls on the creditor (Art. 534).

A contract being made by an agreement between the parties, it would appear that no outsider can have any right to assert in connection with it. In case, however, a contract is made between two persons *for the benefit of a third person*, and the latter desires to enjoy such benefit, there is not only no harm in enabling him to do so, but such a course must be agreeable to the intention of the contracting parties. This is why, contrary to the ruling of the Roman law, a contract for the benefit of a third person is made effective even for such third person, the latter's right coming into existence when he expresses to the

debtor his intention to take and enjoy the benefit of the contract (Art. 537).

(3) *Rescission of a Contract (keiyaku no kaijō).*

In certain specified cases, one or both of the parties to a contract is or are legally authorized to rescind it. The termination of a contract by the exercise of the right of rescission, however, must not be confounded with the termination of a contract owing to the fulfilment of a condition subsequent, because (1) while a contract subject to a condition subsequent is terminated as a matter of course upon the fulfilment of the condition, the termination of a contract by the exercise of the right of rescission is effected by an expression of intention on the part of the person entitled, and (2) though by termination by reason of the fulfilment of a condition subsequent, a contract is terminated as from the time of the fulfilment of the condition, termination by the exercise of the right of rescission takes effect as from the beginning of the contract.

Causes for rescission may be either general or special. Special causes are those which are specifically provided in regard to various kinds of contracts. A general cause of rescission is (1) where performance is not made by the other party, and (2) where performance is impossible. If one of the parties does not perform his obligation, the other may demand compulsory execution and/or damages. But this is not sufficient for the protection of the other party; and so the latter is then enabled to rescind the contract on a certain condition (Art. 541). The same applies where performance has become totally or partially impossible by a cause imputable to the debtor, in which case the creditor may rescind the contract (Art. 543).

The rescission of a contract has the effect of restoring things to the state in which they were prior to the formation of such contract—that is to say, when one of the parties has exercised his right of rescission, each party is bound to restore the other

party to his original state; but, of course, the rights of third persons must not be thereby prejudiced (Art. 545).

(4) *Detailed Provisions re Various Kinds of Contracts.*

1. *Gifts* (*sōyo*: *donatio*).—Gift is a contract which takes effect when one of the parties expresses his intention gratuitously to donate certain property owned by him to the other party, and such other party accepts it (Art. 549). Gifts include (1) simple gifts, (2) burdensome gifts, (3) gifts of which the subject is a periodical prestation, and (4) gifts which take effect on the death of the donors. A gift not in writing may be revoked by either party, so long as performance is not yet completed (Art. 550). The donor is, as a rule, under no obligation of warranty—that is, is not responsible for any defect or deficiency in the thing or right given: the only cases where he is under such obligation are (1) where he was aware of the defect or deficiency but did not inform the donee thereof, and (2) where the gift is one subject to a charge (a burdensome gift) (Art. 551).

2. *Sale* (*bai bai*: *emptio venditio*).—Sale is a contract which takes effect when one of the parties agrees to transfer a property right to the other party, and the latter agrees to pay him a price for it (Art. 555). While a property right which is the subject of a gift must always be one belonging to the donor, a property right that does not belong to oneself can also be made the subject of a sale.

A seller is under an obligation of warranty to the buyer in respect to the subject matter of a sale—that is, he is bound (1) to warrant it against defects (either in title or in substance) and (2) (in case the subject-matter of the sale is an obligation) to warrant the solvency of the debtor (Art. 560 *et seq.*).

In regard to the sale of immovables, the Code contains provisions relating to the right of the seller to re-purchase (*kaimodoshi*: *pactum de retroemendo*). The seller of an immovable may, in accordance with a special contract made at the same

time as the contract of sale, rescind the sale on returning the purchase money and the expenses of the contract within a fixed period of time. If, in the case of a sale subject to a special contract of re-purchase, the right of re-purchase be exercised, the sale is regarded as not having taken place at all: the result is that acts done by the purchaser subsequent to purchase and prior to the exercise of the right of re-purchase are all rendered invalid. Inasmuch as a special contract of re-purchase, when registered at the same time as the contract of sale, takes effect even against third persons, transactions of this kind are generally regarded as detrimental to the national economy, therefore certain limitations are placed by the Code on the right to re-purchase — namely, (1) that a contract of re-purchase can be entered into only in regard to the sale of an immovable, (2) that it must be made *at the same time* as the contract of sale, and (3) that the period for re-purchase *must not exceed ten years* and (4) that the sum which is to be paid back for re-purchase is *limited to the purchase money and the expenses of the contract* (Arts. 579 and 580).

The provisions relating to sales apply *mutatis mutandis* to contracts with consideration other than sales in so far as their nature permits (Art. 559).

3. *Exchange* (*kokwan*: *rerum permutatio*).—Exchange is a contract which takes effect when the parties agree to transfer to each other property rights other than the ownership of money. In case either party agrees to transfer to the other a property right, other than the ownership of money, together with a sum of money, whether the act is a sale or exchange is determined by a consideration of the question of to which most importance is attached by the parties—the sum of money or the property right (Art. 586).

4. *Loans for consumption* (*shōhi-taishaku*: *mutuum*).—A loan for consumption is a contract which takes effect when one of the parties receives a sum of money, or something else, from the other party, and agrees to return a thing of the same class,

quality and quantity (Art. 587). In that it is an agreement to return a thing of the same class, quality and quantity as the thing received from the lender, a loan for consumption differs from a loan for use and from a hiring (of things). In that it is a contract which comes into effect upon receipt of a thing, it is further different to a hiring (of things). In case, however, a person is bound to make a prestation of a sum of money, or something else, otherwise than under a loan for consumption, if the parties have agreed to make the thing the subject of a loan for consumption, a loan for consumption is formed by virtue of such an expression of intention without the usual formalities being observed—a provision which has been inserted in the Code in deference to custom and in order to consult the convenience of the parties concerned (Art. 588). A loan for consumption may be subject to interest or otherwise; and the extent of the lender's obligation of warranty varies according to whether the loan bears interest or not (Art. 590).

5. *Loans for use* (*shiyō-taishaku*: *commodatum*).—A loan for use is a contract which takes effect when one of the parties receives a thing from the other party, agreeing to return it after he has made use of and taken the profits of the thing gratuitously (Art. 593).

A loan for use must always be gratuitous—that is to say, no consideration must be payable by the borrower to the lender for the advantage which he derives from the thing borrowed. This is the most important point in which a loan for use differs from a hiring of things. This is also the reason why the provisions relating to gifts apply *mutatis mutandis* to loans for use in regard to the lender's obligation of warranty.

6. *Hiring of things* (*chin-taishaku*: *locatio conductio rerum*).

—A hiring is a contract which takes effect when one of the parties agrees to let the other use and take the profits of a thing belonging to him, and the other party agrees to pay him a rent for it (Art. 601). Thus, unlike a loan for consumption or for use, a hiring is a contract which takes effect from a mere

expression of intention of the parties—that is to say, *delivery of the subject-matter is not essential to its formation*. A hiring is also a contract with consideration—that is, it is always necessary for the lessee to agree to pay a rent in consideration of the use and taking the profits of the subject-matter. A hiring cannot be contracted for a term of more than twenty years, because it is believed that hiring for a longer period might eventually result in impeding the utilization and improvement of things. Hirings of things are treated as “real rights” in some countries; but, under the Japanese Code they are considered as obligations. Obligations cannot, as a rule, be set up against third persons; but it would create considerable inconvenience if the hiring of immovables could not absolutely be set up against third persons; therefore the Code permits registration to be obtained in respect to a hiring of immovables, providing at the same time that in case registration has been obtained, the hiring can be set up against third persons who have subsequently acquired real rights in the immovables (Art. 605). In case the lessee has, with the consent of the lessor, sub-let the thing hired, the sub-lessee is responsible directly to the lessor—an anomalous provision for the protection of the lessor, inasmuch as this authorizes the lessor to exercise his right against both the lessee and sub-lessee (Arts. 612 and 613).

Normally speaking, a hiring should, of course, terminate on the expiration of the term fixed for its duration; but if the lessee continues to use and take the profits of the thing hired after the maturity of the said term, and the lessor, knowing the fact, makes no objection thereto, the contract is legally presumed to have been renewed upon the same terms and conditions (Art. 619).

Contrary to the general rule governing the rescission of a contract, the rescission of a hiring takes effect only for the future (Art. 620)—a provision which also applies *mutatis mutandis* to hiring of services, mandates and associations.

7. *Hiring of services (koyō : locatio conductio operarum).*—

A hiring of services is a contract which takes effect when one party (the servant) agrees to perform services (physical or mental) for the other party (the master) and the latter agrees to pay him a remuneration therefor (Art. 623).

We have seen that obligations can, as a rule, be assigned; but an obligation arising from a contract for hiring of services constitutes an exception to this rule—that is to say, except with the consent of the servant, the master cannot assign his right to the servant's services to a third person (Art. 625). Like a hiring of things, a hiring of services is legally presumed to have been renewed if the servant continues to perform services after the maturity of the term fixed for its duration, and the master, knowing the fact, raises no objection thereto (Art. 629).

8. *Contract work (ukeoi : locatio conductio operis)*.—Contract work is a contract by which one party (the contractor) agrees to accomplish a certain work, and the other party (the locator) agrees to pay a remuneration for the result of such work (Art. 632). It is a matter of indifference whether the result of the work is physical or moral (intellectual) or whether materials have been furnished by the locator or otherwise. In case, however, materials are not furnished by the locator, there may be many cases where contract work hardly presents any appreciable difference to sale.

Seriously as the locator may be affected by the unsatisfactory manner in which the work is performed for him, it is provided that he may, if there be defects in the work, demand repairs and/or damages; while if the defects are so serious that the object with which the contract has been made cannot be attained on that score, he may rescind the contract except the subject thereof consists of buildings (Arts. 634 and 635).

9. *Mandates (i-nin : mandatum)*.—A mandate is a contract which takes effect when one party commissions the other to do a *juristic act*, and the other party agrees to do such act (Art. 643).

As regards the degree of attention which a mandatory is

required to exercise in regard to the management of the business entrusted to him, he is required to act with "the care of a good manager" according to the terms of the mandate (Art. 644). The "care of a good manager" (*senryō-naru kwanrisha no chū*) means that degree of attention which a careful person usually pays in regard to his own property or affairs.

Mandates of which the subject is the doing of acts other than juristic are known as "quasi-mandates" (*jin-i-nin*). To quasi-mandates, the provisions relating to mandates apply *mutatis mutandis*.

10. *Deposits* (*kitaku* : *depositum*).—A deposit is a contract which takes effect when one party receives a thing and agrees to keep it in his custody for the other party (Art. 657). Receipt of the subject-matter is thus essential to the formation of a deposit contract. Deposits under the *Civil Code* are, as a rule, undertaken gratuitously. It suffices for a person who has undertaken a deposit gratuitously to exercise in respect to the keeping of the thing the same care as he does in regard to his own property (Art. 659). Concluded as a deposit contract is for the benefit of the depositor, the latter may at any time demand the return of the thing, even when there is a time fixed for its return (Art. 662). In case the parties have not fixed a time for the return of the thing, the depositary may return it at any time—the result of a deposit being, as a rule, undertaken gratuitously (Art. 663).

An irregular deposit, that is, a deposit of fungible things which the depositary is contractually authorized to consume, it being agreed that it will suffice if he return things of the same class, quality and quantity, may be regarded as the same as a loan for consumption, as, indeed, is the case in some countries; but in the Japanese Code such deposits, too, are provided for along with ordinary deposits, and at the same time it is ruled that the provisions relating to loans for consumption apply *mutatis mutandis* to such deposits. In case, however, there is no stipulation as to the time for its return, it is not (as it is in the

case of a loan for consumption) necessary for the dépositor to fix a period and demand its return within such period; but according to the general rule governing deposits, he may demand the return at any time, inasmuch as while a loan for consumption has the use of the thing for its object, a deposit is made primarily for the safe-keeping of things (Art. 666).

11. *Associations* (*kumi-ai* : *societas*).—A contract of association (*kumi-ai keiyaku*) is a contract by which the parties, consisting of two or more persons, each agree to make a contribution and to carry on a common undertaking (Art. 667). An association (*kumi-ai*) and a contract of association (*kumi-ai keiyaku*) should be distinguished from each other, inasmuch as while the word "association" refers to the relations among the associated members or partners, a contract of association is a contract by which such relations are called into existence.

Money or other property, or even labour, may be furnished by way of a contribution (Art. 667, 2). Partners of a company (partnership) may also furnish *credit* (*shin-yō*) as the subject of a contribution; but such is not the case with the partners of a civil association. An association does not possess the capacity of a juridical person apart from its members, and so the contributions of the partners and other property of an association are the common property of all the partners (Art. 668).

Matters relating to the management of the affairs of an association are decided by a majority vote of the partners (Art. 670). Unless otherwise specially stipulated, the profits or losses of an association are shared or borne in proportion to the value of the contribution of each partner. In case the rate of distribution is determined as regards the profits or losses only, the rate is presumed to be common to both (Art. 674). A partner may dispose of his share in the property of the association; but such disposition cannot be set up against the association and also against third persons who have had transactions with the association (676).

An association is not a juridical person, and so the rights

and duties of the association are at once the rights and duties of the partners. In the present Code, however, it is provided that they are *not jointly liable* upon the obligations of the association: they merely share the burden in proportion to their respective shares (Art. 675).

12. *Life-annuities* (*shūshin-teiki-kin*).—A contract of life-annuity is one by which one of the parties agrees to make to the other party, or a third person, a periodical prestation of money or something else until the death of himself, the other party, or the third person (Art. 689).

13. *Compromise* (*wakai : compromissum*).—A compromise is a contract by which the parties agree to settle a dispute existing between them by mutual concession (Art. 695). When a dispute has once been settled by a compromise, neither party can any longer assert his claim in the same matter, even though he may afterwards discover that the terms of the compromise did not agree with the facts. The Code provides that if by a compromise it has been determined that one of the parties is entitled, or that the other is not, to the right in dispute, such right is regarded as having been transferred by the compromise to the first mentioned party, if reliable proof is afterwards produced showing that he was not previously entitled to the right, or as having been extinguished, if proofs turn up that the second party had it up to the moment of the compromise (Art. 696).

SUB-SECTION 3.

Business Management (*jimu-kwanri : negotiorum gestio*)

“Business management” means to manage the business of another without being under any legal obligation to do so. Though “business management” was formerly considered as a kind of unjust enrichment, experience has shown that there are certain cases where to interfere with the affairs of another person, even without a mandate, is not only not prejudicial to the interests of the principal but actually beneficial, or even very

necessary, for his sake, and so the act cannot be dealt with on the principles governing unjust enrichment. Hence the modern legislative tendency is to separate "business management" from unjust enrichment as another cause of formation of an obligation.

A person who has assumed the management of another's business without being legally bound to do so must continue the management until the principal or his successor or legal representative can undertake it, because if he were to discontinue it half-way, it would have been better not to have begun it at all (Art. 700). As to the degree of attention he is required to pay to the management, the Code provides that he must conduct the management in accordance with the nature of the business and in a manner best calculated to insure the best interests of the principal. But if he knows, or is able to conjecture, the intention of the principal, he is, of course, bound to act according to such intention (Art. 697). In case, however, the management has been assumed in order to protect the principal from *imminent peril* to his person, honour or property, the manager is not responsible for resultant damages unless he has acted in bad faith or with gross negligence (Art. 698).

If the manager has defrayed beneficial expenses (including necessary expenses)—expenses which have proved really and actually beneficial, the principal must reimburse all such expenses to him. In case, however, the management has been undertaken against the wishes of the principal, the latter is bound to reimburse only in so far as he is actually enriched (Art. 702).

SUB-SECTION 4.

UNJUST ENRICHMENT (*futō-ritoku*)*

Unjust enrichment is where a person improperly receives benefit from the property or labour of another and thus causes a loss to such other person.

* See under "condiciones" in Roman Law.

The cases where unjust enrichment occurs are :—

- (1) When a prestation is made with the object of performing an obligation which really does not exist ;
- (2) When a prestation is made for a legal title which has already been extinguished ;
- (3) When a prestation having been made in anticipation of a certain fact or legal effect taking place or not taking place, the event proves contrary to the anticipation.

In case unjust enrichment has been made, the beneficiary must make restitution of that by which he is actually enriched (if he has acted in good faith), or that by which he has been enriched together with interest, and further pay compensation for damages, if any (if he has acted in bad faith) (Arts. 703 and 704).

In case a prestation has been made for an illegal cause, it would theoretically appear that making the prestation as he did without any legal cause to do so, the party should be entitled to demand restitution thereof; but in view of the fact that it is wrong for a person to seek the protection of the law on the ground of an illegal act of his own, he is not enabled to demand restitution; but restitution may be demanded if the illegal cause existed in regard to the other party only (Art. 708).

SUBSECTION 5.

UNLAWFUL ACTS OR TORTS (*fuhō-kōi* : *delicta*).

An "unlawful act" is an act by which a right of another is, in bad faith or with gross negligence, violated, and by which damage is caused to another person (not necessarily the other person). A violation of a right (*kenri no shingai*) means a violation not only of a property right but of one's person, liberty or honour; and a person who has caused damage to another person by such a violation is bound to pay compensation therefor not merely to the immediate victim but (in case the

latter has been done to death) to his parents, spouse and children . who are consequently subjected to mental and pecuniary losses (Arts. 709-711). In this connection, it is specially provided that, in respect to a claim for damages on account of an unlawful act, a child *en ventre sa mère* is regarded as already born (Art. 721).

An "unlawful act" must always be an act which has been done either in bad faith or with gross negligence, that is, by a person possessed of capacity for legal responsibility. So, a minor who is not yet possessed of sufficient intelligence to discern the consequences of his action, or a person who is in a state of mental alienation, is not responsible for an unlawful act committed by him; but in consideration of the fact that it would beat hardly upon the injured party to leave him absolutely without any remedy, it is further provided that the person who is legally charged with the duty of exercising supervision over such incapacitated person is bound to pay damages, unless he can prove that he did not neglect his duty (Arts. 712-714). In case an employee of a certain business has caused damages to a third person in the execution of such business, the employer is also bound to pay compensation therefor, unless he can prove that he did not fail to exercise proper care in the engagement and supervision of such employee (Art. 715). In the case of contract work, the locator is not bound to pay compensation to a third person unless he was in fault in respect to his instructions (Art. 716). The possessor of defective buildings, or of an animal, is also liable for damages caused by such buildings or animal, except he exercises due care (Arts. 717-718). The joint perpetrators of an unlawful act are jointly liable for the resultant damages, and this applies to instigators and to persons who assisted in the act (Art. 719).

A harmful act which has been unavoidably committed in order to protect the rights of oneself or a third person against an illegal act of another is not to be regarded as an unlawful act; therefore the author thereof is not liable for the resulting damages; but in fairness to an outsider who has sustained

- damages in consequence of such act, it is provided that such injured party may claim damages from the perpetrator of that illegal act against which the harmful act has been done (Art. 720).

SECTION 4.

RELATIVES.

SUB SECTION.

INTRODUCTORY.

The word "relative (s)" (*shinsoku*) within the meaning of the Japanese Code denotes—(1) blood-relatives within the sixth degree of relationship, (2) the spouse (wife or husband) and (3) relatives by affinity within the third degree of relationship (Art. 725). Persons who, without being related by blood, are regarded as related, are, besides the spouse and relatives by affinity, (1) adopted children, (2) the *chakubo* and (3) the step-father and mother (Arts. 727 and 728). The word "*chakubo*" is a special technical term which denotes the wife of the father from the view-point of an illegitimate child who has been recognized by the father.

In the Japanese Code, the degree of relationship is determined after the Roman fashion. Thus, between lineal relatives, it is determined by the number of generations between them (Art. 726, 1). For example, father and child are of the first degree of relationship; grandfather and grandchild, of the second degree of relationship and so on. Between collateral relatives, the degree of relationship is determined by the number of generations as ascending from one of them, or his or her spouse, to the (nearest) common ancestor, and then descending to the other from such ancestor (Art. 726, 2). For example, a person and his nephew or niece are of the third degree of relationship, as he is separated from the (nearest) common ancestor by one generation and his nephew or niece is separated from the said common ancestor by two generations.

SUB-SECTION 2.

MARRIAGE (*kon-in*).(1) *Conditions of Marriage.*

The conditions of marriage may be classified into (1) material and (2) formal conditions.

(1) *Material conditions* (*jissitsujō no jōken*) are :—

1. *That the parties are of a marriageable age*—that is, the man is at least 17 years of age and the woman, 15 (Art. 765).
2. *That neither party has a spouse* (*is already married*) (Art. 766). Bigamy is criminal (*Criminal Code*, Art. 184).
3. *That, in the case of a woman going to be remarried, at least six months have elapsed since the dissolution or annulment of her former marriage* (Art. 767, 1). This being a precautionary provision against troubles which might supervene from her being found pregnant within a doubtful period from her premature re-marriage, it does not apply to a man, nor to a woman after she has given birth to a child (Art. 767, 2).
4. *That the parties have not been parties to adultery*—that is to say, a person who has been criminally condemned or judicially divorced for adultery is not permitted to marry the other party to the adultery (Art. 768).
5. *That a certain relationship does not exist between the parties*: marriage is absolutely forbidden between lineal blood-relatives, and also between lineal relatives by affinity. As for collateral relatives, no marriage may be effected between blood-relatives within the third degree of relationship; but there is no such restriction as regards relatives by affinity. Further, between an adopted child, his or her spouse or his

or her lineal descendants or their spouses on the one hand and the adoptive father or mother or his or her lineal ascendants on the other, marriage is forbidden even after the relationship has ceased in consequence of the dissolution of the adoption. (Arts. 769, 770 and 771.)

6. *That the consent of certain lineal ascendants is obtained.* A man under 30 years or a woman under 25 years must obtain the consent of his or her parents belonging to the same house. In case both the father and mother are unknown, or are dead, or have left the house, or are unable to express an intention, this condition need not be fulfilled; but in the case of a person under 20 years of age, it is necessary to obtain the consent of his or her guardian and that of the family council (Art. 772). If, however, the consent is not obtained from the step-father and mother or *chakubo*, one may be married without their or her consent but with the consent of the family council instead (Art. 773).
7. *That the consent of the head of the house is obtained, in the case of a member of a house* (Art. 750).
8. *That the consent of certain authorities or persons is further obtained in case of certain persons.* Thus, in order to be married, a member of the Imperial Family must obtain the permission of the Emperor (*Imperial House Law*, Art. 40); and a peer, the permission of the Minister of the Imperial Household (*Ordinance Concerning Peers*, Arts, 14 and 17). In the case of military men in active service, general officers and persons ranking with the same must obtain the permission of the Emperor; officers, the permission of the War Minister; and warrant officers and downwards, the permission of their respective chiefs (*Regulations Concerning the Marriage of Military Men in Active*

Service). In the case of naval men in active service, admirals and those ranking with the same must obtain the permission of the Emperor; warrant officers upwards, the permission of the Naval Minister; and non-commissioned officers and men, the permission of the Chiefs of the Naval Stations to which they respectively belong (*Regulations Concerning the Marriage of Naval Men in Active Service*).

9. *The free, intelligent and deliberate consent of the parties concerned.* Marriage being founded on a contract between a man and a woman, it is obvious that the mutual consent of the parties is essential, even though there be no express provision to that effect; but this is what is clearly implied by the provision that marriage is void, if owing to mistaken identity, or any other cause, it is found that the parties have had no intention to get married (Art. 778).

- (2) *Formal condition (keishiki-jō no jōken).*—This is fulfilled by a notification to the Registrar previous to the marriage by the parties and two or more witnesses of full age, either verbally or by a writing signed by them (Art. 775).

The particulars to be specified in the notification are as follows (*Law Concerning Family Registries*, Art. 100);—

1. The name, date of birth, place of permanent registry and profession of each party;
2. The name and place of permanent registry of the father and mother (of each party);
3. If either party is a member of a house, the name and place of permanent registry of the head of the house and his or her relationship with the head of the house;
4. If the marriage is a *nyūfu-kon-in* (marriage with a female head of a house and into her house) or *mukoyōshi-engumi* (adoption into a house effected simultaneously with marriage with a daughter of the house), the fact;

5. If in the case of a *nyūfu-kon-in*, the husband becomes the head of the home, the fact.
6. The name and place of permanent registry of the head of the original house, and of the adoptive parents, if one of the parties enters yet another home by marriage from the home into which he or she has been married or adopted.

In case the parties to an intended marriage are resident in a foreign country, the same notification is to be made to the Japanese Minister (Ambassador) or Consul resident in that country (Art. 777).

(3) *Invalidity and Annulment of Marriage.*

An invalid marriage is a marriage which does not come into existence *ab initio*, while the expression "annulment of marriage" denotes to annul a marriage which has once come into existence, so that it ceases to be valid as from the time when it is annulled. A marriage is annulled when the annulment is desired by a person entitled to the right of annulment; but an invalid marriage is invalid without any steps being taken to avoid it: its existence is not legally recognized from the very beginning. A voidable marriage becomes perfectly valid, and unavoidable, when the right of annulment is left unexercised for a certain period of time and so is extinguished by prescription.

A. There are only two cases where a marriage is legally void *ab initio*, namely:—

- (1) When the parties had no intention of getting married (Art. 778, No. 1);
- (2) When no notification has been made to the Registrar (Art. 775 and Art. 778, No. 2).

B. The cases where a marriage may be annulled are:

- (1) When either party was married before attaining the minimum marriageable age; but the marriage can no longer be annulled when it has been expressly ratified after the party has attained the minimum marriageable

age, or three months have been allowed to elapse thereafter without taking any steps (Arts. 765 and 780);

- (2) When the marriage was a bigamous one (Arts. 767 and 780);
- (3) When the marriage was one between parties to an adultery (Arts. 768 and 780);
- (4) When the marriage was entered upon by the woman within six months from the dissolution or annulment of her former marriage (Arts. 767, 780 and 782);
- (5) When the marriage was between relatives who are legally forbidden to intermarry (Arts. 769, 770, 771 and 780). In the above five cases, either party, the head of the home, his or her relatives, or a Public Procurator may apply to a Court for annulment;
- (6) When the marriage has been effected without the consent of the person (s) whose consent is legally required. In this case the person (s) who is (are) entitled to give consent may apply for its annulment (Arts. 772 and 783);
- (7) When one of the parties has been induced to the marriage by fraud or coercion, in which case such party may apply to a Court for its annulment (Art. 785);
- (8) When the marriage is at once a marriage and adoption (*mukoyōshi-engumi*), if the adoption is invalid or is annulled, in which case either party may apply for the annulment of the marriage on that ground (Art. 786).

(4) *Effect of Marriage.*

The effect of marriage may be summarized as follows :—

- i. That the wife is bound to be faithful to her husband. If she should be unfaithful to him and commit adultery, she is liable to both criminal and civil sanction. Civil

- sanction means divorce, for which the husband is then entitled to bring an action (Art. 813, No. 2) :
2. That the wife enters the husband's house and assumes his family name in place of her own, except in the case of a *nyūfu* and *mukoyōshi* (Art 788);
 3. That relationship is called into existence between the wife and the husband's relatives and also between the husband and the wife's relatives (Arts. 725 and 726);
 4. That husband and wife are bound to support or maintain each other (Art. 790);
 5. That the wife is under the obligation to live with the husband, while the husband must permit her to live with him (Art. 789);
 6. That the husband exercises a marital right over the wife—that is, the wife's capacity of action is limited by the husband. In other words, the wife must obtain the permission of the husband in order to do certain acts (*vide* Arts. 14-18);
 7. That in so far as third persons are not prejudiced, a contract made between husband and wife may be cancelled by either party during the continuance of their marriage (Art. 792);
 8. That in case the wife is a minor, the husband acts as her guardian (Art. 791). The same applies when she is declared "incompetent"; and when the husband is declared "incompetent," the wife becomes his guardian (Art. 902).

* * * *

If husband and wife have not, previous to the notification of their marriage to the Registrar, made a contract with regard to their property, their property relations are determined according to the legal arrangement, in virtue of which each party may own property of his or her own, while the husband has the right to manage, use and take the profits of all the wife's property. (Arts. 793, 799 and 801).

(5) *Dissolution of Marriage.*

A marriage is dissolved either by (1) the death of either party or (2) divorce. The former of the two requires no explanation. Divorce (*rikon*) is a method by which a perfectly valid marriage is terminated while both parties are still alive. The Code recognizes divorce by mutual consent as well as judicial divorce. Indeed, the former is, in practice, by far the more frequent of the two.

I. *Divorce by mutual consent.*—This may be effected for any cause whatsoever, provided that the following material and formal conditions be fulfilled :

(1) *Material conditions :*

- a. That both husband and wife have an intention to effect divorce (Art. 808);
- b. That (in the case of a person under twenty-five years of age) the consent of the parents, or guardian and/or the family council is obtained (Art. 809); but in the case of an "incompetent" person, it is not necessary to obtain the consent of the guardian (Art. 810).

(2) *Formal condition :* Notification to be made to the Registrar by the parties and two or more witnesses of full age either verbally or by a writing signed by them.

II. *Judicial divorce* can only be effected for one of the following causes (Art. 813) :

1. When the spouse has committed bigamy;
2. When the wife has committed adultery (even if the husband has entered into illicit intercourse with a woman other than the wife, the latter cannot claim divorce on that account);
3. That the husband has been criminally sentenced to a penalty for illegal sexual intercourse (such as adultery with a married woman);

4. When the spouse has been sentenced to a penalty for a misdeamenour or a graver penalty for an offence connected with forgery, bribery and corruption, indecency, theft, robbery, embezzlement of property received in trust, or stolen or otherwise criminally obtained goods, or any of the offences mentioned in Art. 175 of the *Criminal Code* (connected with obscene pictures, etc.) and Art. 260, ditto (destroying or injuring buildings or ships belonging to others) or to a major imprisonment for a term of three years or a graver penalty for any other offence ;
 5. When such ill-treatment or gross insult as to make conjugal community unendurable has been received from the spouse ;
 6. When wilfully deserted by the spouse ;
 7. When ill-treatment or gross insult has been received from any of the lineal ascendants of the spouse ;
 8. When his or her spouse has inflicted ill-treatment or gross insult upon any of his or her lineal ascendants ;
 9. When, for a period of not less than three years, it has been ascertain whether the spouse is alive or dead ;
 10. When, in case of a marriage which is at the same time an adoption (*mukoyōshi-engumi*), the adoption is dissolved, or, in case of an adopted son married to a daughter of the house, the adoption is dissolved or annulled.
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In case either husband or wife has been adjudged "incompetent," his or her guardian is not entitled to claim divorce on behalf of the "incompetent" person. In case, again, either husband or wife having brought an action for divorce dies before the judgment in the case has become binding, his or her heir (successor) cannot succeed to his or her rights under the action and prosecute the action, inasmuch as by the death of either party the marriage is at once dissolved.

SUB-SECTION 3.

PARENT AND CHILD.

Children (*ko*) are classified into (1) real children and (2) adopted children; and real children are subdivided into (1) legitimate children, (2) illegitimate children and (3) *shoshi* (illegitimate children recognized by their father).

(1) *Real Children.*

In order to be legitimate, a child must be (1) a child of the husband and (2) a child conceived by the wife during the continuance of the marriage. A child born after 200 days from the day of the formation of the marriage or within 300 days from the day of the dissolution or annulment of the marriage is legally presumed to have been conceived during the marriage (Art. 820). But this being nothing but a presumption, it may be upset by counter-proof and the child's legitimacy contested. The right of action of contest vests only in the husband and not in the wife. When the husband is an "incompetent" person, his legal representative is enabled to exercise the right in his place with the consent of the family council (*Civil Code*, Art. 822 and *Law of Procedure in Actions relating to Personal Status*, Art. 28).

In case the husband has died before the birth of the child, or after the birth of the child but before bringing an action contesting its legitimacy, a person whose right of succession is affected by the said child, or a blood-relative of the husband within the third degree of relationship, may bring such action within one year from the death of the husband. If the husband dies while an action of contest of his bringing is still pending, a person whose right of succession is affected by the child in question, or a blood relative of the husband within the third degree of relationship, may succeed to the proceedings in the action (*ditto*, Art. 29).

A *shoshi* is a child born out of wedlock but recognized by the father, while an illegitimate child (*shiseiji*) is a natural

child which has had no such recognition. An illegitimate child becomes a *shoshi*, when recognized by the father : the recognition by the mother alone does not suffice for the purpose. But an illegitimate child and other persons interested may assert facts against recognition (Art. 834).

(2) *Adopted Children.*

The conditions essential to the formation of an adoption (*yōshi-engumi*) include (1) material and (2) formal conditions ; and the material conditions include (1) those appertaining to the adoptive parent and (2) those appertaining to the adopted child.

A. Material conditions appertaining to the adoptive parent :

1. The adoptive parent must be a person of full age and older than the adopted child (Arts. 837 and 838) ;
2. No ascendant can be adopted even if he or she is younger than oneself (as may sometimes be the case with an uncle or an aunt, etc.) (Art. 838) ;
3. A guardian cannot adopt his ward not only during the continuance of the guardianship but even after the termination thereof so long as the account of management is not yet completed (Art. 840) ;
4. A person who desires to adopt must obtain the consent of his or her spouse (if any) (Art. 841) ;
5. A person who has a *male* heir presumptive to the house may not adopt another *male*, except the latter is intended to be the husband of a daughter (Art. 839) ;
6. The party (that is, the adoptive parent) must of course have an intention to adopt a certain particular person. Such intention may be expressed not only at the time when an adoption is to be actually effected, but even by a will (as is sometimes the case) (Art. 851 and 848) ;
7. In order to adopt, a child of full age must obtain the consent of his father and mother belonging to the same house ; and a member of a house must further

obtain the consent of the head of the house (Art. 844 and Art. 750, 1);

8. A member of the Imperial Family cannot adopt (*Imperial House Law*, Art. 42).

B. Material conditions appertaining to the adopted child;

1. The consent of the father and mother belonging to the same house (Art. 844);

2. In case a person who has been adopted or married into another house desires to be adopted into yet another house, the consent of the father and mother belonging to his or her original house must also be obtained: but this does not apply when a wife follows her husband into another house (Art. 845). In the case of this and the preceding Number, if the step-father or step-mother or *chakubo* does not give consent, it suffices to obtain the consent of the family council instead. If either the father or mother is unknown, or is dead, or has left the house, or is unable to express an intention, the consent of the other parent only is sufficient. If both parents are in the same predicament, then, in case the party to be adopted is less than fifteen years of age, the consent of the guardian and/or the family council is necessary (Art. 846);

3. The consent of the head of the house (Art. 750);

4. In case a person who has been adopted or married into another house desires to be adopted into yet another house, the consent of the head of his or her original house must also be obtained (Art. 741, 1).

5. The consent of the party to be adopted: Art. 851, No. 1 provides that an adoption is invalid if by reason of mistaken identity, or any other cause, the parties had no intention to conclude the same: but in case the party to be adopted is under fifteen years of age, the father and mother belonging to the same house may

- consent to the adoption on his or her behalf (Art. 843, 1);
 - 6. The consent of the spouse, if any (Art. 841);
 - 7. A member of the Imperial Family cannot be adopted by any person other than a peer (*Imperial House Law, Supplement*, Art. 2);
- C. Formal conditions of adoption* are (Arts. 847-850):
1. Notification to the Registrar by the parties and two or more witnesses of full age either verbally or by a writing signed by them;
 2. Acceptance of such notification by the Registrar.
- D. The cases where an adoption is invalid* are (Art. 851):
1. When, by reason of mistaken identity or any other cause, the parties had no intention to conclude the adoption;
 2. When the parties have failed to make notification to the Registrar.
- E. The cases where an adoption can be annulled* are:—
1. When a minor has adopted, in which case the adoptive parent or his or her legal representative may apply to a Court for its annulment; but the adoption is legally regarded as ratified if it is not annulled within six months from his or her attainment of majority (Arts. 853 and 837);
 2. When an ascendant has been adopted, when a person older than oneself has been adopted, or when a male has been adopted notwithstanding there being a male heir presumptive to the house: in any of these cases, each party, the head of his or her house or his or her relatives may apply to a Court for the annulment of the adoption (Arts. 854, 838 and 839);
 3. When a guardian has adopted his ward either during the continuance of the guardianship or before the completion of the account of management: in this case the right of annulment rests only with the adopted child.

- and his or her relatives on the side of his or her original house (Arts. 855 and 840);
4. When a person with a spouse has, or has been, adopted without the spouse's concurrence: in this case the right of annulment vests in the spouse, but it is extinguished by prescription upon the expiration of six months after he or she had notice of the fact (Arts. 856 and 841);
 5. When, without the consent of the father and mother belonging to the same house, a child of full age has adopted, or a child of fifteen years of age or upwards has been adopted; when, without the consent of the father and mother belonging to his or her original house, a child adopted or married into another house has been adopted into yet another house, or when either the father or mother not being in a state to be able to express an intention, the consent of the other parent has not been obtained, etc.: in such case the person (s) whose consent ought to have been obtained may apply for annulment of the adoption (Arts. 857, 844, 845 and 846);
 6. When, the act being at once an adoption and marriage (*mukoyōshi-engumi*), the marriage is invalid or is annulled: in this case each party may, on that ground, apply for annulment (Art. 858);
 7. In case either party has been induced, by fraud or coercion, to be a party to the adoption, such party may apply for annulment thereof within six months from the time when he or she discovered the fraud or regained freedom of action (Art. 859).

E. Effect of adoption.

1. An adopted child has the same rights and duties as a real child, for Art. 860 provides that an adopted child acquires the status of a legitimate child of the adoptive parents from the day of adoption. It should, however,

be noted (1) that though he or she acquires the same rights and duties as a real child of the adoptive parents, he can yet be married to another real or adopted child of the adoptive parents (Art. 769) and (2) that although an adopted child acquires the same rights and duties as a real child of the adoptive parents, he or she does not entirely lose, on that account, his or her rights and duties in the original house, and so it may sometimes happen that his or her rights and duties in the adoptive house conflict with those in the original house. Hence the necessity of special remedial provisions such as that of Art. 956.*

2. The adopted child enters the adoptive parents' house (Art. 861).

G. Dissolution of adoption.—An adoption may be dissolved either (1) by mutual consent or (2) judicially. While an adoption may be dissolved by mutual consent for any cause whatsoever, judicial or compulsory dissolution can only be demanded for certain specified causes.

I. Dissolution of adoption by mutual consent.

i. Material conditions :

- (a) Consent of the parties : but if the adopted child is under fifteen years of age, agreement to be arrived at between the adoptive parents and the person(s) entitled to give consent to the adoption on behalf of the child (Arts. 862, 843 and 846);
- (b) That the adopted child has not yet become the head of the house (Art. 874);
- (c) In case the adopted child is not less than fifteen years old and under twenty-five years, it is neces-

* Art. 956 reads : If there are several persons of the same rank bound to furnish support, the obligation is borne by them in proportion to their respective means. But as between persons who belong to the house and others who do not, those who belong to the house must furnish support first.

sary to obtain the consent of the person (s) who was (were) entitled to give consent to the conclusion of the adoption (Arts. 863, 844, 845 and 846); but in the case of an "incompetent" person, the consent of his or her guardian need not be obtained (Art. 864).

2. *Formal conditions.* Notification to the Registrar and acceptance of the same by the latter.

II. *Judicial dissolution of adoption.*—The cases where an adoption can be judicially dissolved are (Art. 866) :—

1. When one party has received ill-treatment or gross insult from the other ;
2. When one party has been wilfully deserted by the other ;
3. When the adopted child has received ill-treatment or gross insult from a lineal ascendant of the adoptive parent ;
4. When either party has been sentenced to major imprisonment for a term of not less than one year or a graver penalty ;
5. When the adopted child has been guilty of a grave fault tending to disgrace the family name or endanger the property of the house ;
6. When the adopted child has absconded and has not returned home for three years or more ;
7. When it has been uncertain for three years or more whether the adopted child is alive or dead ;
8. When a lineal ascendant of one party has received ill-treatment or gross insult from the other party ;
9. When in case of a *muko-yōshi* there has been a divorce, or in case of an adopted son married to a daughter of the house there has been a divorce or annulment of marriage.

III. *Effect of dissolution of adoption:*—

1. That the adopted child recovers the status which he formerly possessed in his or her original house, without prejudice, however, to the rights which third persons have already acquired in the said original house (Art. 875);
2. That in case a husband and wife have been adopted together or an adopted son has been married to an adopted daughter of the adoptive parent, if the adoption of the wife only is dissolved, the husband must either (1) dissolve his adoption, too, and leave the adoptive house together with the wife, or (2) remain in the adoptive house by divorcing the wife instead; and if the adoption of the husband only is dissolved, it is a matter of course that the wife should follow him wherever he goes (Arts. 876, 745 and 788).

(3) *Parental Power.*

Parental power (*slanken*) is exercised by the father *belonging to the same house* over a child in minority (and also over a child in majority not possessed of an independent livelihood). If, however, the father is unknown, is dead, has left the house, or is unable to exercise it, the power is exercised by the mother *belonging to the same house* (Art. 877).

Parental power is exercised in two ways; namely, (1) in regard to person and (2) in regard to property.

1. *Parental power in regard to the person* includes :

(1) *Power to protect the child* (Art. 879);

(2) *Power to educate the child* (ditto): if the child is possessed of property of his own, the cost of education is to be defrayed out of such property: otherwise, the expenses must necessarily be defrayed by the parent;

(3) *Power to fix the child's place of residence* (Art.

880): according to Art 749, 1 of the Code, a member of a house may not fix his place of residence against the will of the head of the house, and so it may be asked what is to be done if a child who is a member of a house has fixed his place of residence against the will of the head of the house and according to the will of the parent, in case the head of the house is not identical with the parent: in such case the head of the house is relieved from the duty to furnish support to the child (Art. 749, par. 2). But what if, on the contrary, the child does not reside at a place which the parent has fixed for his residence? The answer is that no sanction is provided in the Code for this act of disobedience on the part of the child;

- (4) *Power to give permission to the child's applying for enrolment in the military service* (Art. 881);
- (5) *Power to impose disciplinary punishment*: Though the parent is entitled to disciplinary power, he is not empowered to exercise it in a manner incompatible with the *Criminal Code* and other penal laws. When the parent abuses parental power or is guilty of flagrant misconduct, the Court may, upon the application of a relative of the child, or a Public Procurator, decree that his or her parental power is lost (Art. 896). The parent may also place the child in a house of correction (*chōkaijō*) for a term not exceeding six months, but only with the permission of the Court (Art. 882);
- (6) *Power to authorise the child to carry on business or to annual or restrict such authorization* (Arts. 6 and 883).

2. *Parental power in regard to property* includes:

(1) *Power to manage property.* The father who exercises parental power may not decline to manage the child's property, though the mother in the same position may (Arts. 884 and 899). In the following cases, however, the parent has no power to manage the property involved, namely. (a) when the child in minority is authorized to carry on business (Art. 6) and (b) when a third person who has given property to the child gratuitously has expressed the intention that it shall not be managed by the father or mother exercising parental power (Art. 892). Such property is managed by a manager designated either by the donor or by the Court. It suffices for the person exercising parental power to use as to the management of the child's property the same care as he bestows on his or her own property. If the child in minority over whom parental power is exercised has a spouse, the latter's property, too, is to be managed by the person exercising parental power also with the same attention as he or she exercises in regard to his or her own property; but in case the husband in minority has contractually undertaken to pay the attention of a good manager, the person exercising parental power must also manage it with that particular attention (Arts. 4, 18, 885 and 889). When the child has ceased to be under parental power, the father or mother, who has exercised parental power must without delay make up an account of management. But this account seems to be of no great practical importance, since it is further provided that the expenses of bringing up the child and managing his or her property are deemed as a set-off against the

income derived from the property of the child, though this does not apply to property which a third person, expressing a contrary intention, has given the child gratuitously (Arts. 890 and 891);

- (2) *Power of representation.*—The father or mother who exercises parental power is regarded as representing the minor in all juristic acts done by him or her in so far as they relate to the property owned by the child. This power of representation comprises not only matters relating to the utilization, preservation and improvement of property but even those relating to the disposal thereof. Though the person exercising parental power may thus do all acts of disposal in regard to the child's property, the power of representation cannot be exercised without the child's consent so far as those acts are concerned by which obligations are created having acts of the child for their subject (Art. 884). It should be noted that the power of representation under consideration is confined to the property of the child only, and that, so far as the person of the child is concerned, the person exercising parental power has no right of representation;
- (3) *Power to give consent.*—In order to carry on a business or profession, a minor must obtain the authorization of the person who exercises parental power (Art. 883).

The parental power exercised by the father is not the same as that exercised by the mother, for there are many cases where the mother cannot act on behalf of the child, or authorize the child to act, without her first obtaining the concurrence of the family council. Any act done or authorized (for the minor to do) by the mother without such concurrence of the family council may be annulled by the child or his or her legal repre-

sentative (Arts. 886 and 887). As to acts in regard to which the interests of the father or mother who exercises parental power conflict with those of the child, he or she must have the family council appoint a special representative. The same applies for one of the children in case the father or mother exercising parental power over two children, their interests conflict with each other (Art. 888).

We have already seen that if a person exercising parental power abuses the power or is guilty of flagrant misconduct, he or she may be judicially deprived of the same power on the application of a relative of the child, or a Public Procurator (Art. 896). In case, however, the person who exercises parental power has merely mismanaged the property of the child, the Court may, on the application of a relative of the child, or a Public Procurator, deprive him or her of the right of management only. In this case, the other person (if any) who is entitled to exercise parental power exercises the right of management only; but if there is no such person, the same is then done by a guardian (Arts. 897 and 900).

SUB-SECTION 4.

DUTY OF SUPPORT.

Duty of support (*fuyō no gimu*) denotes the legal duty of a person to maintain or educate another, when the latter is unable to support himself or to procure an education with his own property. The extent to which, and the manner in which, support is to be furnished vary with the needs of the person entitled to support and with the social status and means of the person bound to furnish it (Arts. 960, 961 and 962).

As to who are bound to furnish support, (1) the head of a house is bound to support the members of the house (Art. 747), (2) husband and wife are bound to support each other (Art. 790); and the same applies to (3) lineal blood-relatives, (4) brothers and sisters, and (5) as between a husband or wife on one hand and the lineal ascendants of the other party belonging to

the same house on the other hand (Art. 954). In case there are several persons bound to furnish support, the order in which they are required to perform the obligation is as follows (Art. 955) :—

1. Spouse ;
2. Lineal descendants (if there are two or more of these the person nearest in degree of relationship is liable first);
3. Lineal ascendants (ditto) ;
4. Head of the House ;
5. Lineal ascendants of the spouse and spouses of lineal descendants always belonging to the same house (the remark in parenthesis under No. 2 applies also here) ;
6. Brothers and sisters.

If there are two or more persons of the same degree of relationship, those who belong to the same house are liable before those who do not; and if, there being two or more persons of the same degree of the relationship, they all are in the house, or are not in the house, the obligation is borne by them in proportion to their pecuniary abilities (Art. 956).

If there are too many persons entitled to support for the means of the person bound to furnish it, support is to be furnished in the following order (Art. 957) :—

1. Lineal ascendants (if there are two or more of these, the person nearest in degree of relationship is entitled first) ;
 2. Lineal descendants (ditto) ;
 3. Spouse ;
 4. Lineal ascendants of the spouse and spouses of lineal descendants always belonging to the same house (ditto) ;
 5. Brothers and sisters ;
 6. Members of the house other than mentioned above.
- If there are two or more persons entitled to support

of the same rank, each may receive support in proportion to his or her needs (Art 958).

SUB-SECTION 5.

HEAD AND MEMBERS OF A HOUSE.

A person becomes the head of a house (*koshu*) either (1) by succession or (2) anew. The question of who becomes head of a house by succession is one to be considered when we come to treat of succession in general. A person becomes head of a house anew, that is, founds a house :—

- (1) When a person who has entered another house by marriage or adoption ought, in the usual order of things, to return to his or her original house in consequence of a divorce or dissolution of adoption, but the original house is already abolished or extinguished (Arts. 739 and 740);
- (2) When a person is excluded from his or her house: this happens when a member of a house—except a minor—fixes his residence against the intention of the head of the house or a member of a house has been married or become a party to an adoption without the consent of the head of the house (Arts, 742, 749, and 750);
- (3) When a person who has entered another house by marriage or adoption ought, in the usual order of things, to return to his or her original house in consequence of a divorce or dissolution of adoption but cannot do so, because his or her return is refused by the head of the house (because the latter's consent has not been obtained to said marriage or adoption) (Arts. 742 741, and 750);
- (4) When both the father and mother of a child are unknown (as in case of a foundling or stray child) (Art. 733, par. 2);

- (5) When an illegitimate child cannot enter the mother's house (Art. 735, par. 3);
- (6) When the head of a house dies and there is no heir to the house, in which case the house is extinguished and each member of the house founds a house (Art. 764);
- (7) When a member of a house establishes a branch house; in order to establish a branch house the consent of the head of the house must be obtained: the head of a house is not permitted to establish a branch house (Art. 743);
- (8) When a member of a house re-establishes the principal house, a branch house or a co-ordinate or collateral house (*dōke*) or the house of a relative, which has been abolished or extinguished (Art. 743).

Members of a house (*kazoku*) may be (1) born members or (2) members coming from the outside.

The causes for which a person becomes a member of a house otherwise than by the title of birth are:—

- (1) Marriage (Art. 788);
- (2) When, subsequent to marriage, the husband enters another house, in which case the wife follows him into that house: the same applies when the husband founds a new house (Art. 745);
- (3) Adoption (Art. 861);
- (4) When a person who has entered another house by marriage or adoption, takes in relatives of his or her own in the original house but who are not relatives of his or her spouse or adoptive parents, in which case such relatives become members of the house into which he or she has been married or adopted (Art. 738);
- (5) When a person who has become a member of another house by marriage or adoption returns to the original house in consequence of a divorce or dissolution of

- adoption, such person becomes a member of the original house again (Art. 739);
- (6) In case of a change in the head of a house, the former head of the house and members of his house become members of the house of the new head (732, 2);
 - (7) A relative of the head of a house who is in another house may, with the consent of the head of the other house, become a member of that house to whose head he or she is related (Art. 737);
 - (8) When a person who has entered another house by marriage or adoption enters yet another house by marriage or adoption, such person at once becomes a member of the latter house. In this case, however, the consent must be obtained both of the head of the first mentioned house and of the head of the party's original house (Art. 741).

SUB-SECTION 6.

GUARDIANS.

A guardian (*kōken-nin*) is either for (1) a minor pure and simple or for (2) an "incompetent" person (who may be either a minor or a person of full age). A minor is placed under a guardian (1) when there is no person to exercise parental power over him or her, or (2) when the person who exercises parental power has no right of management. A person is always placed under guardianship when he is adjudged "incompetent." (Arts. 4, 7, 8 and 900, and *Law of Procedure in Actions relating to Personal Status*, Art. 52).

A guardian for a minor may be either (1) one designated by will by the person who was the last to exercise parental power (Art. 901), or (2) a legal one—that is, the head of the house, who becomes guardian by operation of law when there is no such designated guardian (Art. 903), or (3) an appointed one—that is, a guardian who is chosen and appointed by the family council when there is neither guardian designated by will nor

legal guardian, or they have declined to act or lack the qualifications for being guardian (Arts. 904, 907 and 908).

A guardian for an "incompetent" person may be either (1) a legal or (2) an appointed one.

(1) *Legal guardian*.—In case a person is adjudged "incompetent," the father or mother who exercises parental power becomes his or her guardian. When a married woman is adjudged "incompetent," her husband becomes her guardian; but, if he does not, the father or mother who exercises parental power becomes her guardian. If a husband is adjudged "incompetent," his wife becomes his guardian, but if she does not, or if she is a minor, the father or mother who exercises parental power becomes guardian. If there is nobody to be guardian to a member of a house according to the foregoing provisions, then the head of the house becomes the guardian. (Arts. 902 and 903.)

(2). *Appointed guardian*.—If there is nobody to be guardian in accordance with the foregoing provisions, one is chosen and appointed by the family council (Art. 904).

As to the qualifications for being a guardian, it is provided that none of the persons mentioned below can become a guardian (Art. 908):—

1. Minors;
2. "Incompetent" persons and "quasi-incompetent" persons;
3. Persons who have been deprived of civic rights, or those who have been suspended from the enjoyment of civic rights;
4. Legal representatives or curators who have been removed (dismissed) by a Court;
5. Bankrupts;
6. Persons who have, or have had, a lawsuit against the ward or his or her spouse or lineal blood-relatives;
7. Persons whose whereabouts are unknown;
8. Persons whom the Court has found to be unfit for the

functions of a guardian, to have been guilty of improper conduct, or to be addicted to gross profligacy.

We have already seen that a "quasi-incompetent" person is placed under a curator. The provisions relating to guardians mostly apply *mutatis mutandis* to curators. With regard to acts in which the interests of a curator or of a third person for whom he acts as representative conflict with those of the quasi-incompetent person, the curator must apply to the family council for the appointment of a special curator (Art. 909.)

A guardian is placed under the control and supervision of a supervisor of guardianship, who is either designated by will by the person who was the last to exercise parental power, or (in the absence of such designation) appointed by the family council (Arts. 910 and 911). A guardian must not enter upon his duties until there is a supervisor of guardianship (Art. 911.)

The duties of a supervisor of guardianship consist in (1) supervising the doings of the guardian with the attention of a good manager, and being present when the latter examines the property of the ward and prepares an inventory of the same, (2) expediting the appointment of a new guardian and his taking up his duties in case a guardian has ceased to exist, (3) adopting necessary measures in case of emergency and (4) representing the ward in regard to acts respecting which the interests of the guardian or of a third person whom he represents conflict with those of the ward (Art. 915).

The affairs of a guardian may be classified into (1) those relating to the person, and (2) those relating to the property, of the ward.

As regards the person of the ward, the guardian to a minor has the same rights and duties as a father or mother who exercises parental power, such as protecting and educating him and giving permission to his applying for enrolment in the military service, though in certain matters he (the guardian) must obtain the consent of the family council (Art. 921). But the guardian has no such rights and duties, if there is a person who exercises

parental power over the minor *minus* the right of management (Art. 935). The guardian to an "incompetent" person must attend to the medical treatment and nursing of the same according to the latter's means and resources (Art. 922). In both cases, if the ward is the head of a house, the guardian exercises the rights of the head of the house in place of the ward (Art. 934).

As regards the property of the ward, the rights and duties of a guardian may be summarized as follows: (1) he must prepare an inventory of property (Art. 917); (2) he must declare to the supervisor of guardianship any obligations which he has against, and/or bears towards, the ward (Art. 919); (3) he must, at least once a year, report to the family council on the state of the ward's property (Art. 928); (4) if the ward has acquired property by universal succession, he must, as to such property, do the same acts as those mentioned in (1) and (2) (Art. 920); (5) he must determine the amount to be annually expended on account of the ward (Art. 924); (6) he represents the ward in regard to the management of the ward's property and juristic acts relating to such property (Art. 923); (7) he must deposit with a person to be fixed on by him, with the consent of the family council, the monies received on account of the ward (Art. 927); (8) he must obtain the consent of the family council in order to do certain important acts relating to property on behalf of the ward (Art. 929); (9) the same applies when he (the guardian) hires property of the ward (Art. 931); and (10) he must furnish security for the management and restitution of the ward's property (Art. 933), etc.

Guardianship terminates (1) when the guardian (a) dies, (b) becomes disqualified, (c) has absconded or (d) has ceased to be the head of a house (in the case of a guardian who has become such because of his being head of a house) or (e) has ceased to be spouse to the ward (in the case of a person who has become guardian because of his or her being spouse to the ward) or (2) when the ward (a) dies, (b) has attained majority

(in case of a minor) or the adjudication of " incompetency " has been cancelled (in case of an " incompetent " person) or (c) the ward has been adopted into another house or has otherwise left the house (of which the head is his guardian).

SUB-SECTION 7.

FAMILY COUNCIL.

A family council (*shinsoku-kevai*) is a meeting held chiefly for the purpose of supervising the doings of a guardian, supervisor of guardianship or curator to a minor, " incompetent " person or " quasi-incompetent " person, and so protecting the latter's interests. It is convened by the Local Court of the place of the domicile of such incapacitated person upon the application of the incapacitated person himself, the head of the house, a relative, the guardian, the supervisor of guardianship, the curator, a Public Procurator, or any other person interested (Art. 944).

As to the constitution of a family council, Art. 945, 1 provides that it is composed of not less than three members chosen by the Court from among the relatives of the incapacitated person, or from among some persons otherwise connected with the latter's house. A person who is entitled to designate a guardian may also designate by will the members of the family council (Art. 945, 2). If the number of members so designated falls short of three, the deficiency is, of course, to be made up by the Court. Should a member of the family council die, resign, or be removed (dismissed), the remaining members must apply to the competent Local Court and have the vacancy filled (Art. 950). Matters deliberated upon in a family council are decided by a majority vote of the members (Art. 947.) As regards who should preside over the council, there is no provision, and so there is nothing for it but to conclude that a chairman is to be chosen by the members from among themselves.

The incapacitated person for whom the council is held,

the father and mother belonging to the same house, the spouse, the heads of the principal and branch houses, the guardian, the supervisor of guardianship and the curator may state their opinions in the council ; and in order that they may be enabled to do so, it is further provided that such persons must be notified of the convocation of the council (Art. 948).

SECTION 5.

SUCCESSION.

SUB-SECTION I.

General Discussion.

The Book of Succession in the *Civil Code* includes not only provisions relating to succession but those relating to wills, inasmuch as wills resemble succession in that they take effect upon the death of the testator, and the greater part of wills relates to legacies and involves [the succession to rights and duties in the same manner as "succession to property." "Succession" (*sōzoku*) denotes to succeed to the rights and duties of the ancestor (predecessor) by a universal title, and may be either succession to status, or status and property, or succession to property only. In the present state of transition in Japan, the claims of families and individuals are mixed up with each other, so that it is not feasible entirely to ignore the succession to the headship of a house which custom has recognized so long. Hence the recognition of the succession to a house side by side with that to property, inasmuch as a member of a house is also permitted to own property independently of the head of the house. Thus, "succession to a house" is primarily succession to the status, and incidentally succession to the property, of the ancestor (predecessor), while, on the contrary, "succession to property" is succession to the property of the ancestor and nothing else.

The time when the right of an heir—that is, the right of

succession (*sōsoku-ken*)—takes effect is known as the commencement of succession (*sōsoku no kaishi*). Previous to that time, an heir has no right of succession, but the mere expectation that he may enter upon succession in future. Who is the heir, and whether such heir has the legal capacity for succession, are questions which can be determined only at the time when succession commences. The time when succession commences is, therefore, the most important factor in the matter of succession.

It is a matter of course that, agreeably with a principle governing capacity for rights in general, a natural person actually existing at the time of commencement of succession should have capacity for the right of succession; but the Code further extends the principle and confers the same capacity upon a child *en ventre sa mère* (Art. 968).

SUB-SECTION 2.

SUCCESSION TO A HOUSE.

Succession to a house (katoku-sōsoku) commences (Art. 964):—

1. When the head of a house dies, resigns from its headship, or loses Japanese nationality;
2. When the head of a house leaves such house in consequence of the annulment of his marriage or adoption;
3. When the female head of a house is married to a *nyūfu*, or when the latter is divorced.

Succession to a house is always entered upon by one individual, because a house cannot have two or more heads at the same time. A person who has capacity for succession, and is in the first successional rank, is an heir to a house who succeeds by operation of law and, as a matter of course, simultaneously with the commencement of the succession. A person

who ought to be heir to a house is, however, excluded from the succession by operation of law (Art. 969) :—

1. If he has been condemned to a penalty for having wilfully put, or attempted to put, to death the ancestor or a person who is in a prior rank with regard to succession to the house ;
2. If he, knowing that the ancestor has been murdered, has failed to inform the authorities of the fact or to lay a formal charge against the perpetrator, except he is without discernment sufficient to distinguish right from wrong, or the murderer is his spouse or one of his lineal blood-relatives ;
3. If he has, by means of fraud or coercion (compulsion), prevented the ancestor from making, annulling or altering a Will relating to the succession ;
4. If he has, by means of fraud or coercion (compulsion), caused the ancestor to make, annul, or alter, a Will relative to the succession ;
5. If he has forged, altered, destroyed or cancelled a Will of the ancestor relative to the succession.

An heir to a house may be disinherited by the Court upon application (Art. 975) :—

1. If he has ill-treated or inflicted gross insult upon the ancestor ;
2. If, through illness or any other physical or mental cause, he is unable to attend to the affairs of the house ;
3. If he has been condemned to a penalty for any offence calculated to disgrace the family name ;
4. If he has been declared "quasi-incompetent" and there is no hope of his amendment ;
5. If there is any other just cause.

An heir to a house may be (1) a legal heir, (2) a designated heir or (3) a chosen heir. (1) Legal heirs to a house are

persons who have the chance of succeeding to a house by operation of law—that is, (a) lineal descendants and (b) lineal ascendants of the ancestor. Among the lineal descendants of the ancestor, a person of a nearer degree of relationship has the preference over a person more distantly related, males over females, legitimate children over illegitimate, *shoshi* over illegitimate children, and an older person over a younger (Art. 970). The lineal descendant of the ancestor who is in the first successional rank is the (first) legal presumptive heir, who has the right to succeed to the ancestor's house in preference over all the rest upon the commencement of the succession. No lineal ascendant of the ancestor has the right to succeed as legal heir, except where there is neither a (first) legal presumptive heir nor a chosen heir of the first class.

A designated heir is a person who has become heir in virtue of designation by the ancestor. Designation of an heir can only be made for succession to a house commencing owing to the death of the ancestor or to his resignation from the headship of the house. A person who has a (first) legal presumptive heir cannot designate an heir to his house: designation of an heir to a house, which was made even when there was no (first) legal presumptive heir to the house, loses its effect, should one come into existence later on (Art. 979).

A chosen heir to a house is an heir to a house chosen by a specific person other than the ancestor, namely, the father or mother of the ancestor, or (in the last resort) the family council. Such choice is made only where there is neither (first) legal heir nor heir designated by the ancestor; and must in first instance be made from among the members of the house in the following order (Art. 982), the heir thus chosen being a chosen heir of the first class:—

1. Spouse who is a daughter of the house;
2. Brothers;
3. Sisters;

4. Spouse who does not fall under No. 1 ;
5. Lineal descendants of brothers and sisters.

In case there are none of these, then the succession is entered upon by a legal heir in second instance—that is, one of the lineal ascendants of the ancestor who is of the nearest degree of relationship, the male having the precedence over the female between persons of the same degree of relationship (Art. 984). If there is no lineal ascendant either, an heir is then chosen by the family council from among the relations of the ancestor, the members of the latter's house, the heads of the branch houses and the members of the principal and branch houses, or (in the last resort) from among other persons (Art. 985), this being a chosen heir of the second class.

By succession to a house, an heir acquires the status of the head of the house and so succeeds to all the rights and duties of the former head of the house except those which were exclusively personal to him (Art. 986). The ownership of genealogical records, of utensils for religious purposes, and of tombs and burial grounds always descends to the heir as a special privilege of succession to a house (Art. 987).

In case succession to a house commences owing to loss of Japanese nationality on the part of the head of the house, the heir succeeds to the rights of the headship of a house and the rights constituting a special privilege of succession to a house (that is, ownership of genealogical records, etc.) and his legal portion. In case a head of a house, who is a Japanese subject and has rights which can be enjoyed only by a Japanese subject, has lost Japanese nationality, the rights accrue to the heir to the house; if they are not transferred to a Japanese subject within one year (Art. 990). In case a member of a house, who is a Japanese subject and has rights which can be enjoyed only by a Japanese subject, has lost Japanese nationality, the rights accrue to the National Treasury, if they are not transferred to a Japanese subject within one year (Law No. 94 of the year 1899).

SUB-SECTION 3.

SUCCESSION TO PROPERTY.

There is only one cause for the commencement of "succession to property" (*isan-sōzoku*) and that is the death of a member of a house (Art. 992). While succession to a house can be entered upon by one person only, succession to property can be entered upon conjointly by any number of persons who may be in the same successional rank.

The classes of heirs to property, and the order in which they succeed are (Arts. 994-996) :—

1. Lineal descendants ;
2. Spouse ;
3. Lineal ascendants ;
4. Head of the house.

Among lineal descendants, and also among lineal ascendants, a person of a nearer degree of relationship has the preference. If there are two or more heirs of the same rank, their portions are the same. But the portion of a *shoshi* or of an illegitimate child is half that of a legitimate child.

An heir to property, too, is excluded from the succession by operation of law, or judicially disinherited for causes similar to those for which an heir to a house is excluded from the succession by operation of law or judicially disinherited (Arts. 997-1000).

"Succession to property" is succession to property and nothing more—that is to say, an heir to property succeeds, upon the commencement of the succession, to the rights and duties appertaining to the property of the ancestor except those which were exclusively personal to the ancestor (Art. 1001). If there are two or more heirs to property, the property of the succession constitutes their joint property (Art. 1002). Each co-heir succeeds to the rights and duties of the ancestor in proportion to his portion (Art. 1003).

As to the partition of the property of the succession among

the co-heirs, it is governed by a principle different from that governing the partition of ordinary common property—that is, each co-heir is regarded as having exclusively owned the portion accruing to him, not from the time of the partition (as in case of partition of ordinary common property), but from the time of commencement of the succession (Art. 1012)—a provision which is intended to minimize contention and discord among the co-heirs who are closely related to each other.

SUB-SECTION 4.

ACCEPTANCE AND RENUNCIATION OF SUCCESSION.

An heir is, as a rule, permitted to accept the succession either unlimitedly or limitedly or renounce it; but there are two important exceptions to the rule—namely, (1) that the first legal presumptive heir to a house may not renounce the succession (Art. 1020) and (2) that the heir to a house in consequence of the resignation of the head of the house from its headship may neither accept the succession limitedly nor renounce it (Art. 752).

An acceptance or renunciation must be effected, if at all, within three months after the heir had knowledge of the commencement of the succession (Art. 1017). So long as he neither accepts nor renounces, he must manage the property of the succession with the same care as his own property (Art. 1021). An acceptance or renunciation once effected can no longer be annulled except for a cause for which juristic acts in general can be annulled (Art. 1022). An heir is regarded as having made an absolute (unlimited) acceptance (Art. 1024):—

1. If he has wholly or partly disposed of the property of the succession;
2. If he has neither accepted limitedly nor renounced the succession within three months from the time when he had knowledge of the commencement of the succession;

3. If, even after the succession has been either accepted limitedly or renounced, he has concealed, secretly consumed, or failed in bad faith to enter in the inventory the whole or a part of the property of the succession; but this does not apply after a person becoming heir in consequence of his renunciation has accepted the succession.

In the case of a limited acceptance, the heir pays the obligations of the succession and legacies only to the extent of the property acquired by the succession (Art. 1025) and no merger (confusion) of property is permitted—in other words, the rights and duties which the heir had *vis-à-vis* the ancestor are not to be regarded as extinguished by the succession (Art. 1027). Renunciation takes effect retroactively as from the time of the commencement of the succession (Art. 1039), so that, in case of an heir renouncing, it has the same effect as if he was not heir from the very beginning.

If there are two or more heirs to property, and one of them has renounced the succession, his portion accrues to the other co-heirs in proportion to their respective portions (Art. 1039,2).

SUB-SECTION 5.

SEPARATION OF PROPERTY.

Separation of property (*saisan no bunri*) is an arrangement by which the property of the succession and the heir's own property are kept apart, so that the creditors of the succession and legatees on one hand, and the heir's own creditors on the other, may obtain payment out of the several properties in preference to each other. If, in case of an unlimited acceptance of a succession, the property of the succession should get mixed up with the heir's own property (as it would but for a special arrangement), the creditors of the succession and the heir's own creditors would have to obtain payment out of the mixed property, with the result that the creditors of the

succession would be subjected to losses if the ancestor had means of payment and the heir had no money besides the property of the succession, while the heir's creditors would be the losers if the heir's own property was just sufficient to satisfy their claims or less and the property of the succession was less than the liabilities of the succession. To guard them, therefore, against the unexpected losses which they might otherwise sustain in consequence of the commencement of a succession, a creditor of the succession, a legatee, and also a creditor of the heir, are invested with a right to apply to the court for the separation of the property of the succession from the heir's own property. In the case of a limited acceptance, where the heir is bound to pay the creditors of the succession only to the extent of property acquired by the succession, it may, at first sight, appear as if there was no occasion for separation of property. Separation of property and limited acceptance are, however, different in effect, inasmuch as the former is recognized for the protection of the creditors, and the latter for the protection of the heir. Moreover, there are certain cases where, as we have already seen, the effect of limited acceptance is lost, and the heir is regarded as having made an absolute acceptance. Separation of property is, therefore, necessary even where a limited acceptance has been effected. (For the procedure for separation of property, *vide Art. 1041 et seq.*)

SUB-SECTIGN 6.

FAILURE OF HEIRS

Seeing that it would be prejudicial to public as well as private economy to leave things *in status quo* when it is uncertain whether there is an heir to a succession which has commenced, the property of the succession in such a case is constituted into a juridical entity and placed under the charge of a manager specially appointed by the Court, until it is ascertained that there is an heir or that there is no heir. Should it be

ascertained that an heir exists, the juridical entity is regarded as not having existed: without prejudice, however, to the validity of acts done by the manager within the scope of his powers. Should there be no person who asserts his right as heir even after the manager has observed the legal formalities to induce an heir (if any) to make his appearance, the property of the succession accrues to the National Treasury. (Art. 1051-59.)

SUB-SECTION 7.

WILLS

A will (*yuigon*) is a formal act—that is, an act which can only be done in conformity with one of the forms prescribed in the Code (Art. 1060).

As to the capacity for making wills, the provisions governing capacity for juristic acts in general do not apply (Art. 1062). Any person who is at least fifteen years of age may make a will (Art. 1061), provided always that he has capacity of will (*ishi-nōryoku*) sufficient for the act at the time of doing the same (Art. 1063).

A ward may not make a will for the benefit of his guardian or the latter's spouse or lineal descendants before the completion of the account of guardianship, except the guardian is a lineal blood-relative, the spouse, or a brother or sister of the ward (Art. 1066).

In so far as the provisions relating to legal portions are not contravened, a testator may dispose of the whole or a part of his property by a universal or a particular title (Art. 1064). A legatee by a universal title (*hōkwatsu-juisha*) has the same rights and duties as an heir to property (Art. 1092). A child *en ventre sa mère* may also become a legatee (Art. 1065). A person who has done to the testator any of the acts for which an heir to a house is excluded from the succession by operation of law cannot claim a legacy (Art. 1065 and 969).

The forms of a will may be either (1) ordinary or (2)

special. (1) *Ordinary forms* are forms which are to be observed under ordinary circumstances and include (a) holographic deeds, (b) notarial deeds and (c) secret deeds (Art. 1067). (a) A will by holographic deed is one the whole text of which is written, dated and signed by the testator himself (Art. 1068). (b) A will by notarial deed is one which a Notary has been required to make out in the presence of witnesses (Art. 1069). (c) A will by secret deed is one which is produced to a Notary in a sealed envelope (Art. 1070).

(2) *Special forms* are forms in which wills may be made under certain special circumstances, namely :

- (a) Wills of persons on the verge of death (Art. 1076);
- (b) Wills of persons who are isolated from the outer world on account of an infectious disease (Art. 1077);
- (c) Wills of persons belonging to the Army or Navy in time of war (Arts. 1078 and 1079);
- (d) Wills of persons on board ships (Art. 1080 and 1081).

A will made in one of the special forms becomes void if the testator lives for six months from the time when he became capable of making a will in an ordinary form (Art. 1085).

Two or more persons are not permitted to make their wills by one and the same deed (Art. 1075).

A will takes effect upon the death of the testator (Art. 1087, 1) so, at any time after the death of the testator, but not previously, a legatee may accept or renounce his legacy (Art. 1088). Unless there be a different expression of intention in the will itself, a legacy does not take effect if the legatee dies previous to the death of the testator (Art. 1096).

If a legacy does not take effect, or if it becomes void by renunciation, that which would have been due to the legatee accrues to the heir (Art. 1097). In case a burdensome legacy has been renounced by the legatee, the person entitled to the

benefit of the burden may become the legatee himself (Art. 1104, par. 2).

The subject of a legacy is, as a rule, to be delivered to the legatee in the condition in which it is found at the time of the death of the testator (Art. 1102).

Conflicting in most cases as a will does with the interest of the heir, the testator may designate one or more executors for his will or instruct another person to do so (Art. 1108); and it is only when there is no special executor that the heir is bound to execute it himself. As to the execution of a will, provisions are contained in Arts. 1106—1123.

A will taking effect only upon the death of the testator, the latter may at any time revoke the whole or a part of the same. Such revocation, however, can only be effected in a form required for a will, though not necessarily in that form in which the particular will was made (Art. 1124).

A will is regarded as having been tacitly revoked.

- (1) If it conflicts with a later will: in this case, the earlier will is regarded as having been revoked by the later will, in so far as the part in which they conflict is concerned (Art. 1125, par. 1);
- (2) If it conflicts with a subsequent act *inter vivos*; in this case the will is regarded as having been revoked in so far as the part in which it conflicts with the act is concerned (Art. 1125, par. 2);
- (3) If the testator has intentionally destroyed the will or the subject-matter of a legacy (respecting which the will has been made): in this case, the will is regarded as having been revoked in so far as the part so destroyed is concerned (Art. 1126).

SUB-SECTION 8.

LEGAL PORTIONS.

The *legal portion* (*iryū-bun*) is that part of the property of

the succession which the ancestor is not permitted freely to dispose of, but which must be reserved for the heir(s). The arrangements about legal portions have been made in accordance with custom and also in the interest of the public. A lineal descendant who is the legal heir to a house receives as his legal portion one half of the ancestor's property, while any other heir to a house receives as his legal portion one third of the ancestor's property (Art. 1130). A lineal descendant who is heir to property receives as his legal portion one half of the ancestor's property; but a spouse or lineal ascendant who is heir to property receives as his or her legal portion one third of the ancestor's property (Art. 1031).

In case there are two or more heirs to property of the same rank, the said legal portion—that is, one half or one third (as the case may be) of the ancestor's property—is divided in equal proportion if they are all legitimate children, or (if not) at the rate of two for a legitimate child against one for a *sheshi* or illegitimate child (Art. 1146).

A legal portion is determined by adding to the value of the ancestor's property (at the time of the commencement of the succession) the value of the property which the ancestor disposed of as gifts within one year before the commencement of the succession, and deducting therefrom the total amount of his liabilities at the time of the commencement of the succession. The value of the genealogical records, etc.), the ownership of which descends to the heir as a special privilege of succession to a house) is not taken into account in the determination of a legal portion (Art. 1132). A person entitled to a legal portion, or his successor, may, in so far as is necessary for the preservation of the legal portion, demand the reduction of legacies and also of those gifts which were made within one year before the commencement of the succession (Art. 1134 *et seq.*).

CHAPTER VI.

THE COMMERCIAL CODE.

The *Commercial Code* (*shōhō*) contains provisions relating to commerce such as partake of the nature of private law. It consists of five books on (1) General Provisions, (2) Companies, (3) Commercial Transactions, (4) Bills and (5) Commerce by Sea.

SECTION 1.

GENERAL PROVISIONS.

SUB-SECTION 1.

APPLICATION OF THE LAW.

There are three sources of law applicable to commercial matters, namely, (2) the *Commercial Code*, (1) customary commercial law and (3) the *Civil Code*. Commercial matters are, as a rule, governed by the *Commercial Code*. But customary commercial law applies if there is no provision in the *Commercial Code*. If there is no customary commercial law either, the *Civil Code* is then applied (Art. 1). Juristic acts relating to commerce are commercial transactions (of which more will be said later). Unless otherwise provided by law or ordinance, the provisions of the Code apply to commercial transactions of public juridical persons (Art. 2). A bilateral juristic act may be a commercial transaction only in regard to one party thereto; but the provisions of the *Commercial Code* apply to both parties in regard to such a transaction (Art. 3).

SUB-SECTION 2.

TRADERS.

A trader (*shō-nin*) is a person who, in his own name, does commercial transactions as a business (Art. 4).

A minor or married woman may also carry on business with the permission of the legal representative or husband (*Civil Code*, Arts. 6 and 15). The legal representative of an incapacitated person may carry on business on behalf of such incapacitated person with the consent of the family council. In any of these cases, it is always necessary to obtain registration of the fact (Arts. 5 and 7). In case a minor or married woman has been permitted to become a partner with unlimited liability in a partnership, he or she is treated as a person of full age in so far as the business of such partnership is concerned (Art. 6).

SUB-SECTION 3.

REGISTRATION.*

Matters which require registration under the *Commercial Code* are scattered over the code. Registrations under the *Civil Code* can be set up absolutely against third persons whether acting in good faith or in bad faith; but registrations under the *Commercial Code* are governed by a totally different principle, for they merely authorize persons to *presume* that the facts registered must be known. So, even after a registration has been made and published, the fact registered cannot be set up against a third person if he was ignorant thereof for a just cause (Art. 12). A registration of the formation of a company constitutes the sole exception to the rule, for the formation of a company, when registered at the place of its principal office, can be set up against any and every third person (Art. 45).

In case a registration conflicts with the publication, it is the registration that is to be followed as valid (Art. 14).

Affairs relating to commercial registration (*shōgyō tōki*) are placed in the charge of the Local Courts. The place where commercial registrations are to be obtained is the place of the place of business of the party concerned, or (if he has no place

* *Vide* special Chapter No. VII. on the subject of registrations.

of business) of his domicile (Art. 9 *et seq.*; and *Law of the Constitution of the Courts of Justice*, Art. 15).

SUB-SECTION 4.

TRADE NAMES.

A trade name (*shōgō*) is a name which a trader employs for designating himself in connection with business. It is desirable for business purposes that a trade name of good repute should be kept up as a permanency independent of the changes which may take place in the proprietors of the business establishment. Hence various provisions relating to trade names.

Not only a company (which of course must have a name given to it simultaneously with its formation) but an individual trader may choose any trade name whatsoever, an individual trader being permitted to use even his own name as his trade name (Art. 16). But in the name of a company the word *Gōmei-kwaisha* (ordinary partnership), *Gōshi-kwaisha* (limited partnership), *Kabushiki-kwaisha* (joint-stock company) or *Kabushiki-gōshi-kwaisha* (joint-stock limited partnership) must be employed according to, and to indicate, the nature of the company (Art. 17). Nor may a trader other than a company use in his trade name a word calculated to suggest the existence of a company where there is none, a person acting contrary to this prohibition being liable to a fine of from five *yen* to fifty *yen* (Art 18). In case a trade name has been registered, it has the effect of preventing another person from using the same or a similar trade name in the same city, town or village for the purpose of the same business (Arts. 19 and 20). A trade name can be assigned, and such assignment is of frequent occurrence, because a creditable trade name possesses a great business value (Arts. 21 and 22).

The owner of a registered trade name has, against any violator thereof, (1) a right of action to demand the discontinuation of the aggressive act and (2) a right of action for damages (Art. 20).

SUB-SECTION 5.

TRADE BOOKS.

Trade books (*shōgyō-chōbo*) are books in which a trader enters his business dealings and accounts. A trader (with the exception of a petty trader*) is required to keep trade books and enter therein his daily dealings, etc. The books which traders in general are under a legal obligation to keep are (1) a day book (*nikki-chō*), (2) an inventory (*zaisan-mokuroku*) and (3) a balance-sheet (*taishaku-taishōhyō*). (Art. 25 *et seq.*)

SUB-SECTION 6.

TRADE ASSISTANTS.

Trade assistants (*shōgyō-shiyō-nin*) include (1) procurators, (2) *bantō* and *tedai* and (3) other assistants or employees.

A procurator (*shihainin*) possesses most extensive powers, inasmuch as he is authorized to do, in the place of the principal, all transactions in or out of Court relating to the principal's business (Art. 30, par. 1). When a procurator is appointed, or when his authority of representation is terminated, the fact must always be registered (Art. 31). No limitation upon his power of representation can be set up against third persons acting in good faith (Art. 30, par. 3). Two or more procurators may be caused to exercise power of representation conjointly; in such case an expression of intention made by "a third person" to one of the procurators takes effect as against the principal (Art. 30 (2)). A procurator is under the obligation to refrain from doing commercial transactions on his own account or "on that of a third person, or becoming a partner with unlimited liability in a company, without the permission of the principal" (Art. 32).

Bantō and *tedai* are employees who have power to do all

* Whoever carries on a commercial business with a capital of less than five hundred yen is a petty trader (*ko-shōnin*) (Imperial Ordinance No. 271 of the year 1899).

acts connected with matters of specific kinds, or specific matters only, relating to the principal's business, which have been entrusted to them, while other assistants or employees have, as a rule, no power to do juristic acts on behalf of the principal (Arts. 33 and 34). In short, the relations between the principal on the one hand, and procurators, *bantō* and *tedai* on the other, are those of mandate as well as of hiring of services; while the relations of the principal to other assistants or employees are those of hiring of services, and nothing more.

SUB-SECTION 7.

COMMERCIAL AGENTS.

A commercial agent (*dairishō*) is a person who, without being an assistant, habitually acts on behalf of a particular trader (traders) as his (their) representative or intermediary in commercial transactions in such trader's (traders') line of business (Art. 36). Against performance of an obligation arising in his favour in consequence of his having acted as a representative or intermediary in commercial transactions, a commercial agent has a right to retain things and value papers of which he holds possession on account of the principal (Art. 41). A commercial agent is different from a trade assistant in (1) that he carries on business in his own place of business, and (2) that he defrays business expenses out of his own pocket. In short, the relations between a commercial agent and the principal are founded entirely upon mandate and there is no element of hiring of services in them. A commercial agent is under a legal obligation to refrain from competing with the principal—that is to say, he is not bound to refrain from doing any and every business, but merely business of the same line as the principal's (Art. 38).

SECTION 2.

COMPANIES.

A company (*kewaisha*) is a *shadan** which is established for

* *Shadan* is an association which is constituted as a juridical person.

the purpose of doing commercial transactions as a business ; but a *shadan* which is established for purposes of profit, though not doing commercial transactions as a business, is also considered as a company (Art. 42). In a material sense, a company makes it its object to carry on a common undertaking by uniting quantities of property. In this light, it is founded on the same basis as an association (*kumiai*) in the *Civil Code* ; but while a company is always a juridical person (Art. 44), an association (*kumiai*) never is. This involves considerable difference between the two forms of associations. A company cannot become a partner with unlimited liability in another company (partnership) (Art. 44 (2)).

The companies under the *Commercial Code* are, as already indicated, of four classes—namely (1) ordinary partnerships, (2) limited partnerships, (3) joint-stock companies and (4) joint-stock limited partnerships. In so far as the law is not contravened, a company may be freely organized—that is, without any charter or license from the authorities. The conditions for formation vary according to the kind of company. But in any case, in order that the formation of a company may be set up against third persons, it is necessary that it should be registered at the place of its head office (Art. 45). A company is not permitted to make preparations for commencing business until after it has been registered at the place of its head office (Art. 46). Registration is to be made within a fixed term : for example, the formation of an ordinary partnership must be registered within two weeks from the day when the partnership contract has been made (Art. 51). If official permission is required in regard to a fact to be registered, the period for registration is computed from the time when the document of permission has been delivered (Art. 48 (2)). Should a company fail to commence business within six months after it has been registered at the place of its principal office, the Court may, either on the application of a Public Procurator or of its own motion, order its dissolution (Art. 47). The same applies if a

company should do acts contrary to public welfare or to good morals (Art. 48). When companies are consolidated, the making of the company contract and other acts relating to the formation of the new company are to be made conjointly by the persons appointed by the several companies (Art. 44 (3), par. 2).

SUB-SECTION I.

ORDINARY PARTNERSHIPS.

An ordinary partnership (*gōmei-kwaisha*) is a company which is composed exclusively of partners with unlimited liability, that is to say, persons who are unlimitedly liable to third persons upon the partnership's obligations.

An ordinary partnership comes into existence upon the making of a partnership contract, which instrument must contain certain particulars specified in the Code (Arts. 49 and 50).

Membership of an ordinary partnership is acquired (1) by participating in the organization thereof—that is, signing the partnership contract at the time of its organization, (2) by joining it subsequently to its formation, and (3) by having assigned the interest of a partner.

Each partner is bound to make a contribution in the form of property, personal services and/or credit. Each partner must also refrain from doing, either on his own account or on that of a third person, commercial transactions in the same line of business as the partnership, or becoming a partner with unlimited liability in another company engaged in the same line of business (Art. 60). A partner has the right to participate in the distribution of the partnership property, including (1) the right to participate in the distribution of profits (Art. 67), (2) the right to obtain repayment of his interest in the partnership (Art. 71) and (3) the right to participate in the distribution of the remaining assets of the partnership when dissolved (Art. 85). Unless otherwise provided in the partnership contract, each partner has the right, and it is also his duty, to conduct the affairs of the

partnership (Art. 56). Unless particular partners have, either by the partnership contract or by the consent of all the partners, been designated to represent the partnership, each partner has power to represent the partnership (Art. 61). Two or more partners, however, or a partner and a procurator may be required to represent the partnership conjointly; in such case, an expression of intention made by a third person to either one of them takes effect as against the partnership (Art. 61 (2)). Partners representing the partnership have power to do all acts in and out of Court relating to the business of the partnership (Art. 62). The partnership is liable to pay compensation for damages done to third persons by its representative partners in the performance of their duties. A partnership has a distinct personality as a juridical person, and so the rights and duties of the partnership are quite distinct from the rights and duties of the partners; but founded as an ordinary partnership is on the basis of the personal credit of the partners; it is specially provided that when a partnership's obligations cannot be fully satisfied out of the partnership property, all partners are jointly liable for their performance (Arts. 63 and 64).

The membership of a partner is terminated (1) when the partnership is dissolved, (2) when the whole of his interest is assigned or (3) when he withdraws from the partnership (Arts. 68-70).

The capital of a partnership is the sum-total of the contributions of the partners. The capital of a partnership should not be confounded with the partnership property. The capital is of an abstract nature and it is always fixed except it is increased or reduced in conformity with the procedure for altering the partnership contract; while the partnership property is concrete and varies with the varying results of the operations of the concern, and also with the fluctuation of prices.

An ordinary partnership is dissolved by the consent of all the partners or by the occurrence of one of the causes legally fixed (Art. 74). In case a partnership is dissolved by any cause

other than consolidation or bankruptcy, and yet the manner in which the partnership property is to be disposed of is not fixed by the consent of all the partners, a liquidation must take place (Art. 86). Even after its dissolution, a partnership is deemed to continue in existence in so far as is necessary for the purpose of liquidation (Art. 84). Liquidation proceedings are fully provided for in Arts. 87-99.

An ordinary partnership can be converted into a limited partnership (1) by the consent of all the partners (Arts. 83 (2) and 83 (3)), and (2) by admitting a partner (partners) with limited liability with the consent of all the partners (Art. 83 (4)).

SUB-SECTION 2.

LIMITED PARTNERSHIPS.

A limited partnership (*gōshi-kwaisha*) is a company composed of partners with unlimited liability and partners with limited liability—that is, partners who are liable on the partnership's obligations to the extent of their contributions only. In regard to the partnership, and also to third persons, partners with unlimited liability are placed in almost the same position as the partners with unlimited liability in an ordinary partnership; and so it is provided that, except as otherwise provided, the provisions relating to ordinary partnerships apply *mutatis mutandis* to limited partnerships (Art. 105), the provisions special to limited partnerships relating almost exclusively to partners with limited liability.

The contribution of a partner with limited liability can be made only in money or other property (Art. 108), nor has he any power to conduct the affairs of the partnership or to represent it (Art. 115); but at the same time he is not bound to refrain from competing in business with the partnership (Art. 113), and has the right to supervise the affairs of the partnership (Art. 111).

There are two causes for dissolution which are special to a

limited partnership, namely, (1) the termination of the membership of all the partners with unlimited liability, and (2) the termination of the membership of all the partners with limited liability; but in the latter case the partnership may, by the consent of all the partners with unlimited liability, be continued as an ordinary partnership (Art. 118).

A limited partnership may also be converted into an ordinary partnership with the consent of all the partners, whether with unlimited liability or with limited liability (Art. 118 (2)).

SUB-SECTION 3.

JOINT-STOCK COMPANIES.

A joint-stock company (*kabushiki-kwaisha*) is a company of which the capital is divided up into a number of shares and of which the members are liable upon the company's obligations to the extent of the amount of the shares held by them respectively (Art. 144). For the organization of a joint-stock company, it is necessary that there should be at least seven promoters (Art. 119). When the promoters have made out a company contract and moreover have taken all the shares themselves, the company is thereby instantaneously formed (Arts. 120-123). If, however, the promoters do not take upon themselves the whole of the shares, then subscriptions to shares must be invited (Art. 125). In this case the company is formed upon the conclusion of the general meeting for organization, which is to be held after all the shares have been taken and each subscriber has been required to make the first payment upon the shares (Arts. 129, 131 and 139).

The shareholders must make contributions towards the capital of the company by making payment upon their respective shares (Arts. 127 and 144). A company may sometimes find it necessary to increase or reduce its capital. An increase of capital can be effected only by an issue of new shares: an increase of capital by increasing the amount of each share is not

permitted by the Japanese law. A reduction of capital can be effected not only by an amortization of shares but (in so far as the provisions of the law are not contravened) by a reduction of the amount of each share. The company is under the obligation to issue to the shareholders share-certificates—*instruments*, which serve to facilitate the transfer of shares and also to embody the rights of shareholders. Each certificate must contain certain particulars legally required, and a serial number, and be signed by the directors (Art. 148). Share-certificates are issued either to specified creditors or to bearer (Art. 155). In order that a person holding share-certificates to bearer may exercise his rights as a shareholder, it is necessary to deposit with the company such number of share-certificates as is necessary for the exercise of his rights (Art. 155 (2)).

The indispensable organs of a joint-stock company are (1) the general meeting of shareholders (*kabunushi-sōkwai*) (2) directors (*torishimari-yaku*) and (3) inspectors or auditors (*kansayaku*). The general meeting is an organ which expresses the will of the company and, standing above other organs, decides all important affairs of the company. A general meeting may be either ordinary or extraordinary. An ordinary general meeting is a general meeting which, either according to the company contract or to the provisions of law, must be held at a stated time, or times, annually (Art. 157). An extraordinary general meeting is specially convened in case of need (Art. 159). A general meeting is, as a rule, convened by the directors (Arts. 157 and 159); but in certain cases it may be called by the inspectors or even by certain shareholders (Art. 182 and Art. 160, par 2). Each shareholder may, as a rule, exercise one vote for each share (Art. 162). Except as otherwise provided in the company contract or the law, resolutions in a general meeting are passed by a majority vote of the shareholders present (Art. 161).

The directors are an organ of the company for representing the company and conducting its affairs (Art. 169 and 170). The directors are elected by the general meeting of shareholders

from among the shareholders and there must be at least three of them (Art. 164 and 165). Their official term must not exceed three years ; but it may be exceptionally extended by the company contract until the conclusion of the ordinary general meeting for the last term of distribution falling in the said official term (Art. 166). When the functions of a director have terminated, if it happens that there is no longer the number of directors as required by the law or by the company contract, the retiring director, except in the case of bankruptcy or "incompetency," has still rights and duties as a director until the newly appointed director assumes his duties (Art. 167 (2)). The relations between the company and directors are governed by the provisions relating to mandate (Art. 164, 2) ; and the directors are bound to refrain from doing, either on their own account, or on that of third persons, commercial transactions in the same line of business as the company, or becoming partners with unlimited liability in another company engaged in the same line of business (Art. 175). Nor may they do business with the company either on their own account or on that of third persons except with the consent of the inspectors (Art. 176).

The inspectors or auditors are also permanent organs whose function it is to supervise the directors in regard to the management of the company property and the conduct of its affairs. Like directors, they are also chosen by the general meeting of shareholders from among the shareholders (Art. 189). The official term of an inspector must not be more than two years; but it may be specially extended by the company contract until the conclusion of the ordinary general meeting for the last term of distribution falling in the said official term (Arts. 180 and 189). An inspector cannot at the same time be a director or procurator (Art. 184).

The company must, each time it distributes profits, set aside at least one-twentieth of such profits as a reserve fund until the latter reaches one-fourth of the capital (Art. 194, par 1). In case shares have been issued at a value higher than the face

value, the amount exceeding the face value must likewise be added to the reserve fund until the latter has reached one-fourth of the capital (*ditto*, par. 2). The company may distribute profits only after losses have been made good and the said legal reserve has been set aside (Art. 195); but in the case of a company the business to be carried on by which is of such nature that it cannot be commenced within two years from its organization, it may be provided by the company contract that a fixed interest (not exceeding 6 per cent. per annum) shall be paid to the shareholders until the commencement of the business operations (Art. 196).

The issue of debentures (*shasai*) is a special form in which a joint-stock company is enabled to raise important loans from the general public. Debentures are obligations (debts) pure and simple of the company, that is, they have nothing to do with its capital. The Code contains minute provisions as to the condition for issuing debentures, the manner in which they are to be issued and so on (Art. 199 *et seq.*).

The company contract can be altered only by a resolution of a general meeting of shareholders passed by a majority vote of those present, who must be at least one half in number and value of all the shareholders (Art. 209, par. 1); but in case the said quorum is not present, the Code provides a special arrangement by which a resolution to alter the company contract can be passed, inasmuch as it would involve no small inconvenience to the company always to insist on the presence of the said number of shareholders (Art. 209, pars. 2 and 3). To the latter rule, however, there are two exceptions, namely, (1) when the business for the carrying on of which the company has been formed is intended to be altered and (2) when the company having issued preference shares, an alteration calculated to be prejudicial to the preference shareholders is to be made in the company contract. The business for the carrying on of which the company has been formed is the life and soul of the company, and so any alteration respecting it can be made only by virtue of a

majority vote of a general meeting at which are present at least one half in number and value of all the shareholders (Art. 209, pars. 1 and 4). In case a proposed alteration is prejudicial to the preference shareholders, such alteration must be approved not only by a general meeting of shareholders, but also by a general meeting of the preference shareholders (Art. 212).

The increase or reduction of the capital is one of the most important alterations in the company contract, and so the Code contains special provisions under that head (Art. 210 *et seq.*). A company may issue preference shares (*yūsen-kabu*) only when its capital is increased (Art. 211). Preference shareholders enjoy some special benefit over and above that enjoyed by ordinary shareholders.

A joint-stock company is dissolved (Art. 221).

- (1) By the expiration of the time for which it was formed, or by any cause specified in the company contract;
- (2) If the business forming the object of the company has been completely accomplished, or its accomplishment is impossible;
- (3) By the consolidation of the company;
- (4) By the bankruptcy of the company;
- (5) By order of the court;
- (6) By a resolution passed at a general meeting of shareholders;
- (7) When the number of shareholders is reduced to less than seven.

As in the case of an ordinary partnership, so in the case of a joint-stock company dissolved by any cause other than consolidation or bankruptcy, a liquidation must take place (Art. 226 *et seq.*).

SUB-SECTION 4.

JOINT-STOCK LIMITED PARTNERSHIPS.

A joint-stock limited partnership (*kabushiki-gōshikwaisha*) is a company which is composed of partners with unlimited

liability and shareholders (Art. 235), so that while it is a sort of limited partnership on the one hand, it is, on the other, closely akin to a joint-stock company. It is for this consideration that the Code provides that so far as partners with unlimited liability are concerned, the provisions relating to limited partnerships apply *mutatis mutandis* to joint-stock limited partnerships, and, for the rest, the provisions relating to joint-stock companies apply *mutatis mutandis* to joint-stock limited partnerships, except as otherwise provided (Art. 236).

The partners with unlimited liability must act as promoters and make out a partnership contract and invite subscriptions to the shares (Arts. 237 and 238). Though the partners with unlimited liability are entitled to attend the general meeting for organization, and also general meetings of shareholders and express opinions, they cannot exercise and vote therein, even though they have taken shares (Art. 240). In the case of a joint-stock limited partnership, it is not necessary to elect any directors, inasmuch as it has partners with unlimited liability to conduct its affairs and represent it.

In a joint-stock limited partnership, the partners with unlimited liability are on an equal footing with the general meeting of shareholders, and those partners with unlimited liability who are responsible for the conduct of its affairs are not necessarily bound by the resolutions of the general meeting of shareholders, for it is provided that for matters as to which in the case of a limited partnership the consent of all the partners is necessary, the consent of all the partners with unlimited liability is required in addition to a resolution of a general meeting of shareholders (Art. 244). Such being the relations between the shareholders and the partners with unlimited liability, the inspectors are required to see to the resolutions passed at the general meeting of shareholders being carried into effect by the partners with unlimited liability (Art. 245). In case the membership of all the partners with unlimited liability is terminated, the partnership is necessarily dissolved; but for the

sake of convenience the remaining shareholders are permitted to continue the concern as a joint-stock company (Art. 246).

SUB-SECTION 5.

FOREIGN COMPANIES

When foreign companies (*gwaikoku-kwaisha*) have no places of business in Japan but confine themselves merely to entering into transactions there, they cannot of course be governed by stringent rules. But in case of those foreign companies which have head or branch offices in Japan, it is obviously necessary that they should be subjected to sufficient control. Thus, when a foreign company has set up a branch office in Japan, it must be registered according to the Japanese law ; and, so long as such registration is not made, third persons may disregard or deny the existence of such company (Art. 257). A company which has its principal office in Japan, or which makes it its principal object to carry on business in Japan must, even though it has been formed in a foreign country, comply with the same provisions as a company formed in Japan : no matter what formalities may have been observed abroad, these count for nothing in Japan (Art. 258).

When the representative of a foreign company which has set up a branch office in Japan has, in the conduct of its affairs, done an act contrary to public welfare or to good morals, the court may order such office to be closed (Art. 260).

SECTION 3.

COMMERCIAL TRANSACTIONS.

SUB-SECTION 1.

GENERAL PROVISIONS.

The provisions relating to commercial transactions (*shō-kōi*) are the most important of all the provisions of the *Commercial Code*, inasmuch as they constitute the foundation of the whole

framework of the Code. As to what are "commercial transactions," however, the Code does not furnish a general definition, but enumerates acts which are to be regarded as commercial transactions. Commercial transactions as enumerated in the Code may be classified into (1) *objective* commercial transactions,—that is, acts which are commercial transactions in themselves by whomsoever they may be done, and (2) *subjective* commercial transactions, that is, acts which are commercial transactions only when done by a trader as a business.

(1) *The following are objective commercial transactions*
(Art. 263):—

1. Transactions whose object is either the acquisition for value of movables, immovables or "value-papers" with the intention of disposing of them for profit, or the disposal of the movables, immovables or "value-papers" thus acquired;
2. Contracts for the supplying of movables or "value-papers" to be acquired from others, and transactions for acquiring such things for value in order to perform such contracts;
3. Transactions on Exchange;
4. Transactions relating to bills and transactions relating to commercial instruments of credit other than bills.

(2) *The following are subjective commercial transactions*
(Art. 264):—

1. Transactions whose object is either the acquisition for value or the hiring of movables or immovables with the intention of letting them, or the letting of things thus acquired or hired;
2. Transactions relating to the manufacture or working up of things for other persons;
3. Transactions relating to the supplying of electricity or gas;
4. Transactions relating to carriage;

5. Transactions of contractors for the execution of works or the furnishing of labour;
6. Transactions relating to publishing, printing or photographing;
7. Business of a place for entertaining guests;
8. Money changing and other banking business;
9. Insurance;
10. Reception of deposits;
11. Transactions relating to brokerage or intermediation;
12. Assuming representation in commercial transactions.

These two classes of commercial transactions may be considered as principal commercial transactions in contradistinction to accessory commercial transactions—transactions which are made by a trader for the purposes of his business (Art. 265, par. 1). There are also transactions which are presumed to be commercial transactions : the transactions of a trader are *presumed* to be made for purposes of his business (Art. 265, par. 2) ; but, in their essential nature, such transactions are to be classed with accessory commercial transactions.

Essential as credit and despatch are in commercial matters, there are not a few provisions which constitute exceptions to the general rules laid down in the *Civil Code*. Thus, there are special provisions about (1) representation (Arts. 266-268), (2) the formation of a contract (Arts. 269-272), (3) obligations borne by two or more debtors (Art. 273), (4) the remuneration for transactions (Arts. 274-275), (5) the legal rate of interest (Art. 276), (6) the performance of an obligation (Arts. 278-283), (7) pledges (Art. 277), (8) lien (Art. 284) and (9) prescription (Art. 285).

SUB-SECTION 2.

SALE.

The *Commercial Code* also contains special provisions relative to sale and purchase. Sale and purchase are the most important of commercial transactions, so much so that in former

days they were confounded with commercial transactions. But sale and purchase are not confined to commercial matters, so, minute provisions are now made about them in the *Civil Code*, while some special provisions are included in the *Commercial Code* with a view to simplify and facilitate dealings. The provisions which are found under the heading of sale in the Code are (1) the remedy for the seller when the buyer refuses, or is unable, to accept the thing sold (in this case the seller may deposit it, or sell it at public auction, as a rule, after giving notice to the buyer to accept it within a reasonable fixed term (Art. 286), (2) the termination of a contract of sale by operation of law in case the object of the sale can be accomplished only by performance at or within a certain time and a party suffers such time to elapse without performing (Art. 287); (3) the duty of the buyer immediately to examine the thing sold in case of a sale between traders (Art. 288) and (4) the duty of the buyer to safe-keep the thing bought even when the contract is rescinded (Art. 289).

SUB-SECTION 3.

CURRENT ACCOUNT.

A contract of current account (*kōgo-keisan*) is where two traders or a trader and a person other than a trader who are in regular business relations with each other agree that the whole amount of the obligations arising from transactions between them within a determinate period shall be set off and the balance paid (Art. 291).

As to any single obligation put into current account, performance cannot of course be claimed within the said determinate period, nor does prescription run against it. Even upon the expiration of the said period, the total amount of obligations in favour of one party is set against the total amount of obligations in favour of the other, the balance only being paid by whichever party is in debt, and so payment cannot be

claimed in regard to any separate obligation. When the parties have acknowledged an account containing all the separate obligations existing against each other, the balance payable is then and there confirmed ; and no objection can be made as to a single item, except on the ground of a mistake or omission (Art 294). Founded upon the mutual confidence of the parties as is a contract of current account, each party is enabled to terminate it at any time, should he find it unsafe or undesirable to continue the relation any longer (Art. 296).

SUB-SECTION 3.

ANONYMOUS ASSOCIATION.

Anonymous association (*tokumei-kumiai*) is a contract under which one of the parties makes a contribution (always in money or other property) for the business of the other, and the other divides with him the profits arising from such business (Art. 297). Though an anonymous association is thus founded on the same principle and economic basis as a limited partnership, one is entirely different from the other in point of legal nature. Anonymous association is a sort of contract of association and a contract, too, which comes into existence instantly upon the agreement of the parties. The party who furnishes a contribution is called the "anonymous or sleeping member" (*tokumei-kumiai-in*), who may be a trader or a person other than a trader, a person of full age or otherwise, or even a juridical person. When several persons become anonymous members by several acts, so many independent contracts of anonymous association are formed between them and the other party, who is called the "active member" (*eigyō-sha*), while no relation whatever is formed among the anonymous members themselves.

The active member must always be a trader : he is the independent proprietor of the business which he carries on : he does not carry it on on behalf of the association.

The contribution of the anonymous member becomes the

property of the active member; and the anonymous member has no rights and duties *vis-à-vis* third persons with respect to the transactions of the active member, except when he has agreed that his family or full name be used in the trade name of the active member, or that his trade name be used as the trade name of the active member, in which case he is jointly liable with the latter on all obligations formed after the commencement of such use (Arts. 298 and 299). The active member is bound to employ the contribution made by the anonymous member only for the purposes contractually fixed. The anonymous member has neither the right nor the duty to conduct or participate in the business operations for which he has made a contribution; he has only the right to exercise supervision over the same (Art. 304).

The association is terminated (1) when the business forming the object of the association has been completely accomplished or its accomplishment is found impossible, (2) by the death of the active member or by his being adjudged "incompetent" or (3) by the bankruptcy of either party (Art. 302). It can also be terminated by either party for any unavoidable cause (Art. 301, par. 2). Upon the termination of the contract, the active member must return to the anonymous member the amount of his contribution or the remainder thereof, if it has been reduced by losses (Art. 303).

SUB-SECTION 5.

BROKERAGE.

A broker (*nakadachi-nin*) is a person who makes it his business to negotiate commercial transactions as an intermediary between other persons (Art. 305). In that he acts merely as an intermediary and does not enter into commercial transactions in his own name, a broker differs from a commercial agent and also from a commission agent, and so a broker is, as a rule,

not entitled to receive, on behalf of either party, payment, etc. under a transaction negotiated by himself (Art. 306).

As to the duties of a broker, the Code provides (1) that he must, until the transaction is completed, keep samples delivered to him (Art. 307), (2) that he must make notes of each transaction and deliver a copy thereof to each party (Art. 308), (3) that he must also make entries in his day book about each transaction and furnish either party with a copy thereof, if required (Art. 309) and (4) that if he has not communicated the name of either party to the other, he is liable to perform to the latter (Art. 311). A broker may claim a commission which each party is bound to pay in equal proportion, as he serves the interests of both alike (Art. 312).

SUB-SECTION 6.

COMMISSION AGENCY.

A commission agent (*toiya*), like a forwarding agent (to be discussed in the following sub-section) does "transactions relating to intermediation" (*toritsugi ni kwan-suru kōi*) which are a class of subjective commercial transactions. A commission agent is a person who undertakes, as a business, the sale or purchase of goods in his own name on account of others (Art. 313). By sales or purchases effected by him on account of others, a commission agent acquires rights and assumes duties himself towards the other party: the mandator acquires or assumes no rights or duties whatsoever towards the other party in the transactions. If the other party does not perform his obligation under a sale or purchase effected by a commission agent, the latter is bound to perform in his place towards the mandator (Art. 315). As a rule, a commission agent effects sales and purchases in his own name with third persons for the other parties; but, on certain conditions, he may himself be the buyer or seller and so deal directly with the mandator (Art. 317).

A person who undertakes, as a business, transactions other than sales and purchases in his own name on account of others is a quasi-commission agent. The provisions relating to commission agents apply *mutatis mutandis* to quasi-commission agents (Art. 320).

SUB-SECTION 7.

FORWARDING AGENTS.

A forwarding agent (*unsō-toriatsukai-nin*) is a person who undertakes, as a business, the forwarding of goods in his own name (Art. 321, par. 1). The transactions of a forwarding agent are of the same legal nature as those of a commission agent, though they are different in substance. It is therefore ruled that unless otherwise provided, the provisions relating to commission agents apply *mutatis mutandis* to forwarding agents (Art. 321, par 2).

A forwarding agent is saddled with a graver responsibility than other classes of mandatories, for he is not relieved from liability for damages in respect to loss or damage to, or delay in, delivery of the goods, unless he proves that he and his employees have not failed to use due care as to the receipt, delivery and safe-keeping of the goods, to the choice of carriers or other forwarding agents, and to the carriage of the goods (Art. 322). In other words, there is a presumption against him which must be rebutted by proof.

In case several persons are successively concerned in the forwarding of goods, each subsequent agent is bound to exercise the rights of the prior agents in their place (Art. 325, 1). If a subsequent agent has made payment to an agent prior to him, the former acquires the rights of the latter (Art. 325, 2). The same applies when a forwarding agent has paid to a carrier (Art. 320).

Unless otherwise stipulated, a forwarding agent may himself undertake the carriage of the goods; in such case he has

the same rights and duties as a carrier. When a forwarding agent has, at the mandator's request, made out a way-bill, he is considered to have undertaken the carriage of the goods himself. (Art. 327).

SUB-SECTION 8.

CARRIAGE.

The term "carriage" (*unso*) in its wider sense denotes the transportation of goods or passengers from one place to another. Carriage thus includes (1) carriage of goods and (2) carriage of passengers. Carriage may also be classified into (1) carriage by land and (2) carriage by sea, according to whether it is done by land or sea. But while carriage by sea will be dealt with in a later section, carriage in the sense of this sub-section is confined to carriage by land, which includes not only carriage by land but carriage on lakes or rivers or in ports or bays (Art. 331).

1. *Carriage of Goods.*

The subject-matter of carriage of goods is all kinds of movables. A consignor of goods must, if required, furnish the carrier with a letter of advice (*unsō-jō*), while the carrier must, if required, furnish the consignor with a way-bill (*kwamotsu-hikikaeshō*). Both letter of advice and way-bill must be made out in fulfilment of the conditions legally prescribed (Arts. 332 and 333). If a way-bill has been made out, the relations between the carrier and the holder of the bill are determined exclusively by the tenor of the bill (Art. 334). In case a way-bill has been made out, the goods can be disposed of only by means of such bill (Art. 334 (2)). A way-bill can be indorsed (Art. 334 (3)). The delivery of a way-bill has the same effect as the physical delivery of the goods themselves in regard to the rights exercised in the goods (Art. 335).

A carrier is not relieved from liability for damages in respect to loss or damage to, or delay in delivery of, the goods, unless he proves that he, the forwarding agent, or his or the

agent's employees or other persons employed in the carriage, have not failed to exercise due care as to the receipt, delivery, safe-keeping and carriage of the goods (Art. 337). In case several carriers undertake the carriage of goods successively, they are jointly and severally liable for damages arising from the loss or damage to, or delay in delivery of, the goods (Art. 339). What may be regarded as an exception to these rules governing the liability of a carrier, is the provision running to the effect that if the consignor of specie, "value-papers," or other valuable articles has not made a clear declaration of the nature and value thereof, the carrier is not liable for any damage done to them (Art. 338).

On the arrival of the goods at the place of their destination, the consignee acquires the right of the consignor; and when the consignee has taken delivery of the goods, he is bound to pay the freight and other expenses to the carrier (Art. 343).

2. *Carriage of Passengers.*

A carrier of passengers, too, is not relieved from liability for damages, unless he proves that he and his employees have not failed to use due care as to the carriage (Art. 350).

As regards a passenger's luggage which has been delivered to the carrier, the latter is under the same liability as a carrier of goods, even when he has not received a separate freight for it (Art. 351). But as to luggage which has not been delivered, the carrier is liable for damages only when he or his employees have been faulty or negligent (Art. 352).

SUB-SECTION 9.

DEPOSIT.

What a deposit (*kitaku*) is has already been explained under the chapter devoted to the *Civil Code*. But deposits under the *Commercial Code* involve the depositary in greater liability than those under the *Civil Code*. The most important of deposits under the *Commercial Code* are those made with warehousemen.

A warehouseman (*sōka-eigyōsha*) is a person who undertakes, as a business, the safe-keeping of goods entrusted by others to his care (Art. 357). A warehouseman must, if required by the depositor, furnish the latter with a warehouse instrument which may consist of either (1) a warehouse receipt (*adzukari-shōken*) and instrument of pledge (*shichiire-shōken*) or (2) a warehouse warrant (*sōka-shōken*) only (Arts. 358 and 383 (2)). The warehouse receipt is employed for the assignment of the goods, while the instrument of pledge is employed for obtaining monetary accommodation on the security of the goods. The double instrument plan is adopted as a rule. The provisions relating to warehouse receipts apply correspondingly to warehouse warrants (Art. 383 (2), 2).

A warehouse instrument resembles a way-bill in that when a warehouse instrument has been issued, the disposal of the goods can be effected only by means of such instrument (Art. 365) and that the return of the goods can be demanded only on the surrender of the said instrument (Art. 379).

A warehouseman is exempted from damages in respect to the loss of, or damage to, the goods only if he proves that he and his employees have not failed to use due care as to their safe-keeping (Art. 376). Unless the period of storage is contractually fixed, a warehouseman—except for an unavoidable cause—may not return the goods before six months have elapsed from the day when they were brought into the warehouse (Art. 378). A warehouseman is of course entitled to demand charges for storage, etc., but such demand can be made only at the time when the goods are taken out of the warehouse (Art. 377).

SUB-SECTION 10.

INSURANCE.

For the purposes of the Code, insurance (*hoken*) may be classified (1) into ordinary insurance and mutual insurance, (2) into insurance against loss and insurance on life or (3) into

insurance on land and marine insurance. Mutual insurance (*sōgo-hoken*) which is insurance effected among the members of an association specially organized for the purpose does not entail commercial transactions, and so the provisions respecting it are not included in the *Commercial Code*.

(1) *Insurance against Loss.*

A contract of insurance against loss (*songai-hoken*) is where one party (the insurer or underwriter) agrees to indemnify a loss which is liable to arise from a certain contingent event, and the other party (the insurance contractor) agrees to pay a remuneration (premium) therefor (Art. 384). The party who is to receive an indemnification on the occurrence of loss is the insured (*hoken-sha*). The insurance contractor (*hoken-keiyakusha*) and the insured are usually one and the same person but not necessarily and always so (Art. 401). The interest to which damage is done on the occurrence of a certain contingent event is the "insurable interest" (*juhoken-rieiki*) (as it is technically called). The elements of an insurance contract are, therefore, (1) the parties (including the insurer or underwriter, the insurance contractor and the insured), (2) the insurable interest, (3) risk (a certain contingent event), (4) indemnification of loss and (5) premium (*hokenryō*).

The sum insured (*hokenkin*) must not exceed the value of the insurable interest (Arts. 388-389). If a part of the insurable interest is insured, the liability of the insurer (underwriter) is determined by the ratio which the sum insured bears to the value of the insurable interest (Art. 391).

An insurer (underwriter) is not liable for loss caused by war or civil commotion, by the nature of, or defects in, the subject of the insurance, by its natural waste or by bad faith or gross negligence on the part of the insurance contractor or the insured (Arts. 395 and 396). When an insurance contract is wholly or partly invalid, the whole or a part (as the case may be) of the premium paid may be required to be returned, provided always

that the insurance contractor and the insured acted in good faith and without gross negligence (Art. 399). If, at the time of making the contract, the insurance contractor, by bad faith or gross negligence, failed to disclose material facts or made false statements in regard to material facts, the insurer (underwriter) may rescind the contract; but such rescission takes effect only for the future (Arts. 399 (2) and (3)). The insurer (underwriter) must, if required by the insurance contractor, issue an insurance policy (*hoken-shōken*) which must contain certain particulars specified in the law (Art. 403).

Insurance against loss is, according to the nature of the risks involved, classified into (1) insurance against fire, (2) insurance on carriage, and so on. The Code contains special provisions as to insurance against fire (*kwasai-hoken*) (Art. 419 *et seq.*) and insurance on carriage (*unsō-hoken*) (Art. 423 *et seq.*). As to marine insurance (*kaijō-hoken*), provisions are contained in the Book on Commerce by Sea. The loss indemnifiable by the insurer (underwriter) under a marine insurance contract includes all kinds of losses liable to arise from causes connected with the voyage (Art. 653).

The feature which characterizes marine insurance is the arrangement of abandonment (*ifū*). Abandonment is an expression of intention by the insured to transfer to the insurer (underwriter) whatever remains of the insurable interest, on condition of the whole of the sum insured being paid, in case the subject of the insurance is legally regarded as having been totally lost, the cases where the subject of the insurance is legally regarded as having been totally lost (constructive total loss) being limitatively enumerated in the law (Art. 671).

By abandonment, the insured is entitled to obtain full payment of the sum insured, while the insurer (underwriter) acquires (by subrogation) all the rights of the insured in the subject of the insurance (Art. 677).

(2) *Insurance on Life.*

Opinions differ as to the legal nature of life insurance

(*seimei-hoken*), there even being persons who hold that it is not insurance pure and simple. According to the Japanese law, however, a contract of life insurance is where one party agrees to pay a certain sum of money (the sum insured) dependent on the life or death of the other party or a third person, and the other party agrees to pay him a remuneration (premium) therefor (Art. 427). Thus, life insurance differs from insurance against loss in (1) that the payment for which the contract is made is made dependent on the life or death of a person and (2) that the insurer (underwriter) agrees to pay a fixed sum.

Besides the insurer (underwriter), the insurance contractor and the insured, a life insurance contract may specify the name of a person who is to receive the sum insured (beneficiary).* Insurance against loss being a contract for indemnification of loss, the person who is to receive the sum insured is always the insured or another person who has obtained assignment of the insurable interest from the insured; but insurance on life being a contract for payment of a sum, there can be a person who is to receive the sum insured apart from the insured. For the making of a contract of insurance wherein it is stipulated that the sum insured is to be paid upon the death of another person, the consent of such other person is required unless the insured is the person who is to receive the sum insured (Art. 428, par. 1). The consent of the insured must also be obtained for the assignment of the rights arising from a contract of insurance (ditto, par. 2). The same applies when, the insurance contractor and the insured being identical, the person who is to receive the sum insured assigns his right, or when, the insured—who is also the person who is to receive the sum insured—having assigned his right to another person, the latter assigns the same right to a third person (ditto, par. 3).

When the person who is to receive the sum insured is a third person, such third person enjoys, by operation of law, the benefit of the contract of insurance, and his rights are confirmed

* *Hoken-kingaku uketori-nin.*

once and for all, if the insurance contractor dies without expressing any different intention (Art. 428 (2)). If, the person who is to receive the sum insured is a third person, and such person dies before the insured, the insurance contractor may designate another person who is to receive the sum insured; and if, in such case, the insurance contractor dies without making such designation, the heir of the person who was originally fixed as the person who is to receive the sum insured succeeds to the latter's position as beneficiary (Art. 428 (3)). When the insurance contractor, after making the contract, designates the person who is to receive the sum insured or changes such designation, the insurer (underwriter) must be notified of the fact (Art. 428 (4)). If, at the time of making the insurance contract, the insurance contractor or the insured failed, by bad faith or gross negligence, to disclose material facts, or made false statements in regard to material facts, the insurer (underwriter) may rescind the contract unless he knew, or by negligence did not know, such facts; but this right of rescission is extinguished by prescription, if not exercised within one month from the time when the insurer (underwriter) obtained knowledge of the ground of rescission, or within five years from the time of making the contract (Art. 429).

A person may at once be the insurance contractor and the insured and/or the person who is to receive the sum insured, such being of frequent occurrence in case of endowment insurance (*yōrō-hoken*).

(1) If the death of the insured occurs in consequence of suicide, or of a duel, or any other criminal act, or by the execution of capital punishment, (2) if the death of the insured is wilfully occasioned by the person who is to receive the sum insured, (3) if the insurance contractor has wilfully occasioned the death of the insured, the insurer (underwriter) is not bound to pay the sum insured; but in the cases mentioned in (1) and (2), the insurer (underwriter) is under an obligation to pay back to the insurance contractor the sum accumulated on account of

the insured—that is, a certain part of the premium received from the insurance contractor which the insurer (underwriter) is legally bound to put aside as reserve against payment of the sum insured (Art. 431).

Besides the above, the greater part of the provisions relating to insurance against loss apply *mutatis mutandis* to life insurance (Art. 433).

SECTION 4.

BILLS.

The "bills" (*tegati*) within the meaning of the Japanese law are of three kinds, namely, (1) bills of exchange, (2) promissory notes and (3) cheques.

By a bill of exchange, and also by a cheque, the drawer orders the drawee to pay a certain sum of money to the holder; while, by a promissory note, the maker promises to himself pay a certain sum of money to the holder. Bills of exchange and promissory notes are called "instruments of credit" (*shinyō shōken*)—that is, they are drawn or made for the purpose of circulation, but cheques are "instruments for payment" (*shiharaishi shōken*) and not for circulation.

A few remarks on the nature of rights upon a bill here may not be out of place.

In the first place, rights upon a bill should be carefully distinguished from rights under the law of bills. Rights on a bill are rights which are immediately called into existence by acts done upon a bill and which satisfy the conditions legally instituted, but rights under the law of bills are rights which are recognized by that law. Thus, a claim for payment, claim for security, and claim for recourse, are rights upon a bill, while a claim for the surrender of a bill (Art. 441), the holder's claim for recourse after the extinction of an obligation upon a bill by prescription (Art. 444), etc., etc. are rights under the law of bills.

For the formation of rights on a bill, it is necessary (1) that

a document known as a bill be made, and (2) that such document fulfil the conditions legally specified.

The features which characterize a right on a bill are :—

- (1) That a right on a bill is an obligation which need not rest upon any cause or ground ; and so when a bill has once come into existence, the holder may exercise his right upon it without any regard to the cause for which it has been drawn or made ;
- (2) That a right upon a bill is an instrumental right—that is, a right the scope of which is determined entirely and exclusively by the wording of the instrument (Art. 435) ;
- (3) That a right upon a bill is unilateral—that is, by the acquisition of a bill, a person acquires the right simply and without incurring any liability whatsoever ;
- (4) That a right upon a bill is independent—that is, a person who has done an act on a bill by putting his signature thereon really and actually is absolutely liable on the bill, no matter whether other acts on the same bill are void or voidable. Thus, a person who has put his signature upon a forged or altered bill is liable according to the tenor of such forged or altered bill (Art. 437) ; and even if an obligation of an incapacitated person upon a bill has been rescinded, that does not affect the other rights and duties upon the bill (Art. 438).

An act upon a bill can also be done through a representative ; but representation in such acts is governed by a different principle from representation in ordinary commercial transactions. It is always necessary for a representative to state on the bill the fact that he is acting on behalf of somebody else (the principal) ; otherwise, the act is regarded as having been done on account of the representative himself, and the principal incurs no liability under the instrument (Art. 436).

As already referred to, a right upon a bill is an instru-

mental claim—that is, a person who has put his signature on a bill is liable thereon according to the tenor thereof. It is therefore essential that the particulars to be inserted in a bill should be rigorously limited. Thus, it is provided that "even if matters not provided in the Book of Bills are inserted in a bill, they have no effect under the bill" (Art. 439), while at the same time it is prescribed that a debtor on a bill cannot set up against a person who makes a claim under the bill any defence not provided in the Book of Bills (except such a defence as can be set up directly against such claimant) (Art. 440).

SUB-SECTION I.

BILLS OF EXCHANGE.

Bills of exchange (*karwase-tegata*) are the most important of bills; and so minute provisions are first made relative to them and the greater part of them are applied *mutatis mutandis* to the other kinds of bills—promissory notes and cheques.

A bill of exchange is an order to another person for the payment of a fixed sum to a third person and so it involves at least three participants, namely, (1) the drawee (*furidashi-nin*), (2) the payee (*uketori-nin*) and (3) the drawee (*shiharai-nin*).

1. *Drawing* (*furidashi*).—Besides the signature of the drawer, a bill of exchange must contain the following particulars (lacking any of which the instrument does not take effect as a bill of exchange) (Art. 445):—

1. Words designating the instrument to be a bill of exchange;
2. A sum certain;
3. The full name or the trade name of the drawee;
4. The full name or the trade name of the payee: but in case the sum payable thereon is thirty yen or more, a bill of exchange may be drawn payable to bearer (Art. 449); the drawer may also insert in the bill, together with the full name or the trade name of the

payee, a provision that the holder shall be entitled to payment, in which case the bill has the same effect as one drawn payable to bearer (Art. 449 (2));

5. An absolute order to pay;
6. The date of drawing;
7. A day certain of maturity; but in case this particular is not specified in the bill, it is then payable at sight (Art. 451);
8. The place of payment: if the place of payment is not mentioned in the bill, the place added to the name of the drawee (supposing that there is such an additional statement) is the place of payment.

While the particulars above enumerated must always be inserted in a bill of exchange, the drawer may insert in the bill the name of a "referee in case of need" (*yobi shihrai-nin*) against the possibility of the drawee's refusing to accept the bill (Art. 448) and also the name of a person who is to make payment on behalf of the drawee (*shihrai-tanlōsha*) (Art. 453). He may further specify in the bill at what particular place in the place of payment the bill is to be paid (Art. 454).

2. *Indorsement (uragaki)*.—A bill can, as a rule, be transferred by indorsement (Art. 455). By indorsement, the holder (1) guarantees the payment of the bill and (2) transfers it to the indorsee (*hiuragaki-nin*). But the drawer may make in the bill an additional provision forbidding indorsement (Art. 455). An indorser (*uragaki-nin*) may also insert an additional statement forbidding further indorsement; but in this case it has not the effect of preventing further indorsements, its effect being confined to exempting such indorser from all liability under the bill towards the parties subsequent to his indorsee (Art. 460). Indorsement is also an act upon a bill, and the indorser thereby incurs liabilities under the bill to the parties subsequent to him. Indorsement is made either by (1) writing the full name or the trade name of the indorsee and the date of the indorsement on the bill, a copy thereof or an allonge, and putting the indorser's

signature thereon ("name" indorsement) or (2) putting the indorser's signature only on the bill, a copy thereof or an allonge (blank indorsement); in case a bill has been indorsed in the latter simpler manner, further transfers may be made by mere delivery of the bill (Art. 457).

Intended as a bill is to be paid on the day of maturity, it is hardly necessary to point out that its circulation should end before the day of maturity. In case, therefore, a bill is indorsed after the expiration of the period for making a protest for non-payment—that is, after the two days next following the day of maturity, the indorsee acquires only the rights of his indorser—that is, those defences which the debtor under the bill might have set up against the particular indorser may also be set up against the indorsee (Art. 462).

In order that a holder of an indorsed bill may exercise his right, it is necessary that the bill should contain an unbroken series of indorsements; in this connection, a cancelled indorsement being considered as not having been written (Art. 464).

A debtor on a bill, that is, the drawer, the acceptor, or an indorser may again obtain transfer of the bill by indorsement: such indorsement is called "inverse indorsement" (*modori-uragaki*) (Art. 456). A holder may also by indorsement give a mandate to collect the bill (collection indorsement: *toritate-inin-uragaki*) (Art. 463).

3. *Acceptance* (*hikiuke*).—Acceptance is an act by which the drawee expresses to the holder his intention to pay in due time the sum due on the bill. So long as he does not accept, the drawee is under no liability whatsoever under the bill, his name having been mentioned in the bill at the option of the drawer who may be a total stranger to him. Acceptance is also usually made by putting the drawee's signature on the bill (Art. 468). For acceptance, the holder must present the bill to the drawee (Art. 465). This is what is called "presentation for acceptance" (*hikiuke no tame ni suru teiji*). In the case of a bill payable on a fixed day after sight, the holder must present

it to the drawee for acceptance within one year from its date (Art. 466). But in the case of any other bill, it is at the option of the holder whether he will present it for acceptance or no. It may be presented for payment at once without presenting it for acceptance first—that is, if he is willing to forego his claim for security against the prior parties.

By acceptance of the bill, the drawee becomes bound to pay the amount of the bill as the principal debtor on the instrument (Art. 470). Acceptance must be simple and absolute. Acceptance which is not simple and absolute—that is, which is subject to a condition or limitation (except limitation of acceptance to a part of the sum specified on the bill) is legally regarded as acceptance refused (Art. 469).

4. *Claim for security (tampo seikyu).*—This, and also the claim for recourse (to be discussed later on), are rights against the prior parties on the bill. When the drawee does not accept the bill (Art. 474), and (2) when the acceptor has been adjudged bankrupt and yet does not give proper security (Art. 480), the holder may require any of the prior parties to give him proper security for the amount payable on the bill and expenses. The prior parties on a bill are the drawer and indorsers who have done acts on the bill by putting their signatures thereon prior to the holder.

In order to claim security, it is necessary for the holder to have the bill protested for non-acceptance (Art. 475). An indorser against whom a claim for security has been made, and who has given security accordingly, may himself claim security against any party prior to him (Art. 476). A party against whom a claim for security has been made must, without delay, give proper security on the surrender of the protest for non-acceptance, or deposit a proper sum of money with a Public Deposit Office instead (Art. 477).

When a prior party, other than one immediately prior to the holder, has given security or made a deposit according to the foregoing provision, it is deemed to have been done for the

benefit of, and against, all parties subsequent to him (Art. 478). Security loses its effect, and any deposit made in lieu of security may be reclaimed (Art. 479):—

1. Upon a subsequent absolute acceptance;
2. Upon payment of the amount of the bill and expenses;
3. If the person who gave the security or made the deposit, or a party prior to him, has made payment on recourse;
4. If the rights under the bill have been extinguished by prescription or by a deficiency in formalities;
5. If, within one year from the day of maturity, recourse for payment has not been taken against the person who has given the security or made the deposit.

5. *Payment (shilarai).*—In order to obtain payment of a bill, the holder must present the instrument to the drawee, acceptor or person who is to make payment on behalf of the drawee. This presentation for payment must be made on the day of maturity or within the two days next following. The holder of a bill of exchange payable at sight must present it for payment within one year from its date, on pain of forfeiting his claim for recourse against the prior parties (Art. 482). Payment, however, need not be made except on the surrender of the bill (Art. 483). The holder may not refuse even part payment (Art. 484, par. 1). In case of part payment, the holder must make a note of it on the bill and also make a signed transcript thereof and deliver the same to the payer (*ditto*, par. 2). If payment of the bill has not been claimed, the acceptor may, after the expiration of the period for making a protest for non-payment—that is, subsequent to the two days next following the day of maturity—free himself from his liability by depositing the amount of the bill (Art. 485), otherwise he (the acceptor) remains liable for three years after the day of maturity.

6. *Claim for recourse (shōkwan-seikyū).*—This is a right by virtue of which, in case the drawee does not pay the bill, the holder may cause any prior party to perform his obligation as

guarantor. In order to exercise this right, it is necessary for the holder (1) to present the bill for payment on the day of maturity or within the two days next following, and (2) to have the bill protested for non-payment within the same period (in case payment has not been made); if the holder should omit to take these measures, he loses his rights under the bill against the prior parties (Art. 487). An indorser against whom a claim for recourse has been made must, on the day when he has received notice of such claim or within the two days next following, give notice of the fact to the party *immediately* prior to him (Art. 488). If such notice has been given to a prior party who is not the party immediately prior to him, the holder or indorser is bound to make good damages thereby done to the parties subsequent to such party and also forfeits his claim for recourse for the interest and expenses in so far as those parties are concerned (Art. 488 (2)).

If mention is made on the bill of any person who is to make payment on behalf of the drawee (acceptor), the holder must of course claim payment first from such person, and, when the latter fails to pay, the holder must have the bill protested for non-payment; otherwise he will lose his rights under the bill against the acceptor also (Art. 490).

The holder may take recourse for (1) the sum due on the bill together with legal interest thereon from the day of maturity, and (2) the fees for the protest and other expenses (Art. 491); while an indorser who has paid on recourse may himself take recourse for (1) the sum paid by him together with legal interest thereon from the day of payment, and (2) all expenses incurred by him (Art. 492).

In order to claim recourse, the holder of a bill of exchange may draw another bill of exchange upon any party prior to him. This is what is called an "inverse" bill (*modori-tegata*). (Arts. 493 and 494).

7. *Suretyship* (*joshō*).—Technically speaking, suretyship on a bill is of two kinds, namely, (1) open suretyship and (2)

covert or hidden suretyship. Covert or hidden suretyship is where a person who is really intended to be surety is caused to become a debtor on the bill as drawer, indorser or acceptor. Suretyship implies a lack of credit on the part of the principal debtor and the fact that any debtor on a bill stands in need of a surety may tend to lessen the credit of the bill itself. It is in order to remove this apprehension that resort is had to covert or hidden suretyship. In view of the law of bills, however, covert suretyship is not suretyship in the strict sense of the term.

In order to be a regular surety for an obligation under a bill, a person must put his signature as such on the bill, a copy thereof, or an allonge. Suretyship upon a bill may be not only for the obligation of the acceptor but also for that of the drawer or an indorser. When a person thus becomes surety for a debtor under a bill, he thereby undertakes the same liability as the principal debtor and this even when the obligation of the principal debtor is invalid (Art. 497). A surety who has performed his obligation as such acquires the rights which the holder had against the principal debtor and the rights which the principal debtor would have against the prior parties (Art. 499).

8. *Intervention (sanka)*.—When a third person steps into the relations of a bill in order to prevent the holder from exercising his claim for security or claim for recourse, when the bill is not accepted or paid, this is called intervention. Intervention may be either (1) acceptance for honour or (2) payment for honor, as it is made for the honour of a particular debtor under a bill. Intervention may be made (1) by a referee in case of need, (2) by a third person other than a referee in case of need, or (3) even by a debtor under the bill who may intervene in the interest of a prior party. It goes without saying that intervention, too, must be made by putting one's signature upon the bill.

(1) *Acceptance for honour (sanka-hikiuke)*.—Acceptance for honour is where, the drawee of a bill having refused to

accept it, a third person accepts it in order to prevent the holder from exercising his claim for security ; it is an expression of intention to pay the amount of the bill when the drawee does not pay it on the day of maturity. The holder may refuse an acceptance for honour from a person other than a referee in case of need (Art. 501). If several persons offer to accept for honour, the holder may, at his option, decide which of them is to be allowed to accept (Art 502). Unlike payment for honour, acceptance for honour does not terminate the rights of the holder, but merely prevents him from claiming security from the prior parties ; and so who is to be acceptor for honour is a matter of vital importance to the holder. Hence the above provisions. An acceptor for honour is bound to pay the amount of the bill and expenses to the parties subsequent to the party for whom he has accepted (Art. 505), while on the other hand the holder and the parties subsequent to the party for whom acceptance for honour has been made lose their claim for security (Art 506), and the party for whom acceptance for honour has been made may claim security from the parties prior to him (Art. 507).

(2) *Payment for honour (sanka-shūkarai).*—Payment for honour is payment of a bill which is made by an acceptor for honour, a referee in case of need, or any other third person, when the drawee fails to pay. The holder cannot refuse payment even from a person other than a referee in case of need or other than an acceptor for honour (Art. 509). If several persons offer to pay for honour, the holder must accept that person's payment by which the greatest number of persons are discharged from liability (Art. 510). By payment for honour, the holder loses his rights upon the bill and the payer acquires the rights of the holder against (1) the acceptor, (2) the person for whose honour he has paid and (3) the parties prior to such person (Art. 513).

9. *Protest (kyōsetsu-shōsho).*—A protest is a formal instrument for proving that a certain act which is necessary for the

preservation of a right under a bill has been done. There are various kinds of protests, the most important of which, however, are (1) protest for non-acceptance and (2) protest for non-payment, to which frequent reference has already been made. It is a general principle in the law of bills that where there is no protest, there is no right against the prior parties. But against a debtor under a bill who has waived protest, it is a matter of course that the holder does not lose his rights under the bill, even though he omits to have it protested (Art. 489). A protest is made out by a notary or bailiff at the request of the holder (Art. 514), and must be drawn up in conformity with the conditions legally required (Art. 515 *et seq.*).

10. *Parts (fukuhon) and Copies (tōhon) of a Bill of Exchange.*—To provide against the loss of a bill on the way to the drawee for acceptance, and also to enable the holder to obtain monetary accommodation while the bill is sent away for acceptance, it is legally permitted to draw a bill in parts or to make copies thereof.

(1) *Parts.*—When required by the holder, the drawer must make parts of the bill and deliver them to the holder after having caused all the indorsers to indorse them (Art. 518). Each part is then legally effective as a complete bill; but as they all represent the rights and duties under one and the same bill, they must not circulate as bills each independent of another, so, in each part of a bill, the fact of its being a part must be indicated; otherwise, the several parts are legally regarded as so many independent bills (Art. 519). But each of the several parts having the same validity as the original bill, acceptance or payment may be claimed by any of them; and when payment is made on the surrender of one of them, all the other parts lose their effect, except the one on which acceptance is made (Art. 520), the last clause being added for the protection of a person who has acquired such part in good faith.

(2) *Copies.*—The holder of a bill of exchange may make copies thereof. On copies, however, persons can do acts only

as indorsers or sureties ; and the rights upon the bill cannot be exercised by means of a copy except against those who have put their signatures thereon as sureties or indorsers. This is why it is provided that the indorsements, etc. transcribed from the original bill must be so marked that they can be distinguished from the indorsements, etc., to be newly made on the copy. (Art. 522).

SUB-SECTION 2.

PROMISSORY NOTES.

A promissory note (*yakusoku tegata*) is a bill by which the maker himself promises to pay a sum certain, instead of ordering another person to do so, as in the case of a bill of exchange—in other words, the maker himself becomes the principal debtor under the bill simultaneously with its making. In this respect, promissory notes must necessarily be governed by rules different from those governing bills of exchange. But the two are akin to each other in many other respects, and so the greater part of the provisions for bills of exchange apply *mutatis mutandis* to promissory notes. The only details which need mention here as special to promissory notes are what are suggested by the difference above referred to. Thus, the particulars to be inserted in a promissory note are different ; in addition to the signature of the maker, it must contain (Art. 525) :—

1. Words designating the instrument to be a promissory note ;
2. A sum certain ;
3. The full name or the trade name of the payee ;
4. An absolute promise to pay ;
5. The date of making ;
6. A day certain of maturity ;
7. The place where it is made.

It is not absolutely necessary to name in a promissory note the place where it is to be paid, since it is provided that in the

absence of such mention, the place where it is made is deemed the place of payment (Art. 526).

In consequence of there being no drawee, there is no acceptance in the case of a promissory note, the result being that those provisions relating to bills of exchange which concern acceptance, acceptance for honour, and claim for security, do not apply to promissory notes.

Nor is it necessary to present a promissory note for acceptance, as in the case of a bill of exchange ; and its circulation never being hindered by such presentation, neither parts nor copies are recognized in the case of a promissory note.

SUB-SECTION 3.

CHEQUES.

Like a bill of exchange, a cheque (*kvittel*) has also a drawee who is required to pay, as well as a drawer and payee. Cheques are drawn, however, for an entirely different economic purpose from bills of exchange ; they are not drawn for the purpose of circulation but in lieu of cash payment. For this reason a cheque is always payable at sight (Art. 532) and its term of circulation is very short : it must be presented for payment within ten days from its date (Art. 533). Payable as it is at sight, it is not necessary to insert therein a day certain of maturity. The particulars to be inserted in a cheque are as follows (Art. 530) :—

1. Words designating the instrument to be a cheque ;
2. A sum certain ;
3. The full name or the trade name of the drawee ;
4. The full name or the trade name of the payee, or a statement that the cheque is payable to bearer ;
5. An absolute order to pay ;
6. The date of drawing ;
7. The place of payment.

In order to draw cheques, it is necessary that there should first be an agreement respecting the drawing thereof. If a

drawer draws a cheque in excess of the amount up to which the drawee may be required to pay in accordance with such agreement, he is liable to a fine of from five *yen* to one thousand *yen* (Art. 536).

In the case of a crossed cheque (*ōsen-kogitte*)—that is, a cheque on the face of which two parallel lines are drawn and the word "bank" or some other equivalent word is written between them by the drawer or holder—the drawee may pay only to a bank (Art. 535).

To cheques, too, the greater part of the provisions relating to bills of exchange apply *mutatis mutandis* (Art. 537).

SECTION 5.

COMMERCE BY SEA.

Laws and ordinances relating to maritime matters are collectively known as "marine law" (*kaishō*), which may be classified into (1) international marine law, (2) public marine law and (3) private marine law. The most important part of private marine law is that which concerns commercial matters. In this way, the following provisions governing commerce by sea constitute part of the commercial law, while at the same time they form a part of marine law.

The Book of Commerce by Sea in the *Commercial Code* deals with (1) ships and ship-owners, (2) mariners, (3) carriage by sea, (4) sea damage (average), (5) salvage, (6) marine insurance and (7) ship's creditors. Of these, we have already briefly touched on marine insurance when dealing with commercial transactions.

SUB-SECTION 1.

SHIPS AND SHIOPWNERS.

The word "ship" (*sempaku*) within the meaning of the *Commercial Code* is confined to those vessels which are used in navigation at sea for the purpose of doing commercial trans-

actions, and the term does not include small vessels or vessels which are wholly or mainly moved by oars (Art. 538).

Ships are, of course, movables ; but seeing that their nature is very different to that of ordinary movables, both in size and in value, they are specially treated by the law ; and in several instances they are governed by the same rules as immovables. Thus, (1) a transfer of the ownership of a ship must be registered in order that it may be set up against third persons (Art. 541) ; (2) a registered ship may be mortgaged (Art. 686) ; and (3) compulsory execution against commercial ships is governed by the provisions relating to compulsory execution against immovables (*Code of Civil Procedure*, Art. 717).

Each ship must have a name and be of a particular nationality. The standards by which the nationality of a ship is determined vary considerably ; but the Japanese *Ships Law* (Art. 1) provides restrictions only in regard to the owners.

A shipowner must obtain registration of his ship and have a ship's certificate of nationality issued to him ; but this is a condition for the exercise of the rights appertaining to a Japanese ship, and not a condition for making a ship a Japanese one (Art. 540 and *Ships Law*, Art. 1).

The rights of a Japanese ship are (1) the right to hoist the national flag of Japan (*Ships Law*, Art. 2), (2) the right to carry on a coasting trade in Japan and to call at ports not open to foreign trade (*ditto*, Art. 3), (3) special rights under the *Law for the Encouragement of Navigation*, etc.

In case the ownership of a vessel is assigned pending a voyage, it is, for the sake of convenience, specially laid down that (unless otherwise provided by special agreement) the profits and losses of the voyage accrue to the assignee (Art. 542).

Owing to the greatness of her value, a ship is often jointly owned by a large number of persons. In such a case, all acts of utilization are decided upon by a majority vote on the basis of their respective interests (Art. 546) ; while in regard to acts of

disposal, the consent of all the co-owners must be obtained. In case it is resolved to undertake a new voyage or to make extensive repairs to the ship, any dissentient co-owner may require the others to buy his interest at a reasonable price (Art. 548). The co-owners must appoint a ship's husband (*sempaku-kewanrin-nin*) to do certain acts for them in regard to the ship (Art. 552). If, in consequence of the transfer of the interest of a co-owner to an alien, or of his loss of Japanese nationality, the ship would lose her Japanese nationality, the other co-owners may purchase such interest at a reasonable price, or apply to the Court and have it sold at public auction; in case a ship owned by a partnership would lose her Japanese nationality because of one of the partners assigning his interest to an alien, the other partners have likewise a right to buy such interest in preference over others (Art. 555).

SUB-SECTION 2.

MARINERS.

The word "*mariners*" (*kai-in*) is a term which covers the entire crew of a ship and includes (1) the master and (2) seamen—a word which applies to the whole crew of a ship with exception of the master.

(1) *The Master* (*senchō*).

In order to become a master, a person must possess certain legal qualifications.

As to the legal relation between master and owner, this is a topic of much discussion; but it would appear that it is to be regarded as based on the hiring of services and representation. But as he is situated in a position differing considerably from that of an ordinary employee or representative, a master is invested with authority of an extensive nature. Thus, as an employee of the shipowner, the master renders services in various ways; while, as the representative of the same, he has (1) authority to do, outside the ship's home port, all acts in or out of court relating to the voyage (Art. 566) and (2) authority to

mortgage the ship, borrow money, pledge the whole or a part of the cargo, or even sell it at public auction, should such course be deemed necessary for the purpose of paying the costs of repairs to the ship, salvage money, or other expenses required for the prosecution of the voyage (Art. 568). The shipowner may, of course, impose a limitation on the master's right of representation; but such limitation cannot be set up against third persons acting in good faith (Art. 567).

Besides, the master is legally authorized to inflict disciplinary punishment upon seamen for the maintenance of order on board (*Law Concerning Seamen*, Art. 36 *et seq.*) and to restrain the freedom of passengers (*ditto*, Art. 43).

While the master is furnished with such an extensive authority, he is, on the other hand, saddled with very grave responsibilities indeed. The more important of these are: (1) that from the time of loading the goods and of the embarkment of the passengers until the discharge of the goods and landing of the passengers, he may not leave the ship (Art. 563); (2) that he must, before starting on a voyage, inspect the ship so as to ascertain whether she is seaworthy or otherwise (Art. 561); (3) that he must keep on board certain specified papers (Art. 562); (4) that he must not freely deviate from the route first fixed (Art. 564); (5) that he must, during the voyage, take such measures in regard to the cargo as are for the best advantage of all the parties concerned (Art. 565); (6) that he is not relieved from liability for damage done by seamen in the performance of their duties unless he proves that he has not failed to exercise due supervision (Art. 559); (7) that he is also liable for damage done to the owner, charterer, shipper, etc. unless he proves that he has not failed to use due care in the performance of his duties (Art. 558); and (8) that he must report to the shipowner on all important circumstances relating to the voyage (Art. 573).

(2) *Seamen (sen-in).*

The word "seamen" is a term which comprehends the

entire crew of a ship other than the master—from high-class seamen such as mates, engineers and doctors to low-class seamen such as sailors, stokers and cooks. The provisions of the Code relative to seamen have for their object the protection of seamen, especially, those of the lower grades.

Seamen are usually engaged by the master and it is hardly necessary to say that the relation between the shipowner and seaman is that of hiring of services. After the formalities of hiring have been duly completed, a seaman must go on board at the time appointed by the master and enter upon his duties (Art. 576). He is entitled to his maintenance during the time of his service (Art. 577). Further, should a seaman during the term of his service fall sick, or be injured, without any misconduct or grave fault on his part, he may claim from the shipowner the costs of medical treatment and attendance for a period not exceeding three months (Art. 578). In addition to the general rules governing the hiring of services, there are special provisions governing the relation between seaman and master, according to which in certain cases either the master or a seaman may rescind the contract, and there are certain cases where the contract is terminated by operation of law (Art. 581 *et seq.*). In case a seaman is discharged during a voyage, he is, under certain circumstances, entitled to be sent back to the port where he was hired. If a change of owners takes place during a voyage, the rights and duties of a seaman under his contract with the old owner continues for and against the new owner—an exceptional provision for the mutual convenience of the parties concerned (Art. 584 and *Civil Code*, Art. 625).

SUB-SECTION 3.

CARRIAGE BY SEA.

Carriage by sea (*kaijō unsō*), too, is provided for under two heads—(1) carriage of goods and (2) carriage of passengers.

(1) *Carriage of goods.*—Carriage of goods by sea must

necessarily be conducted by a ship ; and this is done under a contract of carriage, the subject of which may be either specific goods or the whole or a part of a ship. When specific goods are the subject of the contract, the relation involved is very simple indeed and needs no explanation. But when the whole or a part of a ship is its subject, the contract is somewhat akin to a contract of hiring of a ship. In Japanese law, however, the chartering of a ship (*yōsen*) is dealt with as a relation entirely different from the hiring of a ship (*sempaku no chintaishaku*). Under a contract of hiring, the owner transfers the ship entirely to the possession of the hirer, and the latter is enabled to use it at his discretion ; but under a contract of chartering, though the charterer is enabled to use the whole or a part (as the case may be) of the ship, yet the possession of the ship and the right of management over it are retained by the owner during the whole time.

As carriage by sea is necessarily effected by means of a ship, the carrier in this case is, as a rule, a shipowner. In the case of a hired ship, however, it is a matter of course that the hirer should be the carrier.

The shipowner must effect carriage by the ship specified in the agreement, and must also warrant the fact of her being seaworthy at the time of her sailing (Art. 591). The shipowner cannot relieve himself from liability for damage caused by his own fault, or by the bad faith or gross fault of a mariner or any other person employed, or by the unseaworthiness of the ship (Art. 592). The more important of other special provisions for carriage by sea are concerning (1) the time for loading, (2) the time for discharging, (3) the causes for rescission or termination (by operation of law) of a contract of carriage and (4) the freight. To a certain extent, the provisions relating to carriage of goods by land apply *mutatis mutandis* to carriage of goods by sea (Art. 619).

What corresponds in carriage by sea to a way-bill to be issued by a carrier by land is a " bill of lading " (*senka-shōken*),

which is, when required by a charterer or shipper, made out and delivered by the master or by a person acting in his place (Art. 620 and 621). A bill of lading, too, is a formal instrument (Art. 622) and possesses the same effect as a way-bill (Art. 629).

In case a billl of lading has been made out, the master is bound to deliver the cargo to the holder of such bill. If a bill of lading has been drawn in several parts, the master at the port of discharge cannot refuse to deliver the goods even to the holder of one of them; but outside the port of discharge, he must not deliver them except on the surrender of all the parts (Arts. 624 and 625). In case two or more holders of a bill of lading (drawn in several parts) demand delivery of the goods simultaneously, the master must, without delay, deposit the goods with a Public Deposit Office and give notice thereof to each of the claimants (Art. 626).

(2) *Carriage of passengers*.—In the case of carriage of passengers, it is a rule to issue tickets to passengers as proof of contracts of carriage having been made and formed. Such tickets may be issued to bearer or otherwise. A ticket issued to a person named therein cannot be transferred to another (Art. 630).

During the voyage, the passengers are maintained at the charge of the shipowner (Art. 631); and if the ship is to be repaired during the voyage, the master must also, during the time such repairs are being effected, supply the passengers with proper lodging and maintenance (Art. 636).

With the exception of these and other special provisions relating to the rescission of the contract, the freight, and the ship-owner's liability as to passengers' luggage, the general rules laid down in connection with carriage of passengers by land apply *mutatis mutandis* to the carriage of passengers by sea (Art. 639).

SUB-SECTION 4.

SEA DAMAGE (AVERAGE).

Damage to a ship or cargo while at sea is collectively

known as "sea damage" (*kaison*); and this is classified into (1) isolated sea damage and (2) common sea damage (general average). Isolated sea damage is damage caused by an accident or mishap, while common sea damage (general average) denotes the loss and expenses arising from a disposition made by the master in regard to the ship and/or cargo in order to save both from a common danger (Art. 641). Isolated sea damage is, of course, to be borne by the owner of the thing damaged or lost, and it is not necessary for the *Commercial Code* to make any special provisions in regard to it. As to common sea damage (general average), however, it is to be borne by the persons interested according to the proportion of the value of the ship and/or cargo thereby saved, one half of the freight and the amount of damage forming the common sea damage (Art. 642). But the liability of each person bound to contribute to common sea damage (general average) is always limited to the value of his remaining property (on which such liability falls) at the time when it arrives or is delivered (Art. 644).

If, after common sea damage (general average) has been made good by the contributions of the persons interested, the whole or a part of the ship and/or cargo sacrificed is recovered by the owner, the latter must refund what has been received by way of compensation, after deducting the salvage money and depreciation arising from partial loss or damage (Art. 649).

Expenses which are necessitated because of the ship's being detained by *vis major*, either in the port of departure or in the course of her voyage, are not common sea damage (general average) in the strict sense of the term; but in that they are likewise expenses incurred for the common advantage of ship and cargo, they are technically called quasi common sea damage (quasi general average), and it is legally required that the parties interested contribute towards the payment of such expenses in the same manner as in common sea damage (general average) (Art. 652).

As to the incidence of damage arising from a collision of

ships, this is a most important question which frequently presents itself for solution. On this head, however, the Japanese *Commercial Code* contains only one article which deals with the case where a collision being caused by the fault of mariners of both ships, it cannot be ascertained which ship was most in fault. In such a case, it is provided that the damage is to be borne by the owners of both ships in equal proportion (Art. 650).

SUB-SECTION 5.

SALVAGE (*kainan-kyūjo*).

A person who, without any legal obligation to do so, has saved a ship or the whole or a part of the cargo in case of distress at sea, is entitled to demand salvage money (*kyūjo-ryō*). A salvor, however, may claim no salvage money (1) if he has caused the distress by bad faith or gross negligence, (2) if he has effected the salvage notwithstanding salvage having been declined for a just cause or (3) if he has concealed things saved or arbitrarily disposed of them (Art. 652 (11)). A claim for salvage money is extinguished by prescription on the expiration of one year from the time when the salvage was effected (Art. 652 (16)). The manner in which salvage money is determined, the manner in which it is distributed when salvage has been effected conjointly by two or more persons, etc. are minutely provided in Arts. 652 (3) to 652 (15).

SUB-SECTION 6.

SHIP'S CREDITORS.

The provisions of the *Commercial Code* under the heading "Ship's Creditors" deal chiefly with the classes of obligations which are protected by special preferential rights, the rank of such preferential rights among themselves, and also with regard to other preferential rights, and the causes for which such preferential rights are extinguished (Art. 680 *et seq.*). A registered ship can be mortgaged in accordance with the provisions relating to mortgages of immovables (Art. 686); but it cannot be pledged (Art. 688).

CHAPTER 7.

REGISTRATION (*tōki*).

For the purpose of giving notice to all the world of certain relations and titles, and thus preventing mistakes and complications, the Japanese law provides for a system of public recording which appears to work fairly smoothly in practice. The registration of real estate is governed by the *Real Estate Registration Law* (*Fudōsan Tōki-Hō*), Law No. 24 of the year 1899, while the registration of other civil and commercial matters are governed by the provisions of the *Law Concerning Procedure in Non-contentious Matters* (*Hishō-jiken Tetsuzuki-Hō*), Law No. 14 of the year 1898, and ancillary laws including *Procedure for the Handling of Commercial Registration* (*Shōgyō-tōki Tori-atsukai Tetsuzuki*), Ordinance No. 13 of the Department of Justice, 1899, etc.

SECTION I.

REGISTRATION OF REAL ESTATE (*fudōsan tōki*).

SUB-SECTION I.

INTRODUCTORY.

1. *Registration of real estate* means registration of important matters, relating to rights over immovables, in certain registers kept in the Local Court having jurisdiction over the place where such immovables are situated, which registrations are usually made on the application of the party (or parties) concerned, but sometimes at the request of a public office.

2. *Effect of registrations.*—The effect of registrations varies according to class, but, generally speaking, (1) a registration serves as evidence of the right registered and (2) the acquisition or loss of, or alteration in, a right in real estate can only be set

up against third persons (irrespective of whether they are acting in good or bad faith) when registered (*Civil Code*, Art. 177).

3. *Principles involved in the system of registration.*—According to one principle, registration is a condition for the acquisition or loss of, or alteration in, a real estate; while, according to another, the acquisition or loss of, or alteration in, a real right in real estate takes effect from the mere expression of intention of the parties so far as the parties are concerned, but it cannot be set up against third persons unless registered. The Japanese law acts on the latter principle (*Civil Code*, Art. 176 and 177). But in order that a registration may be valid against third persons it is essential that it should be founded upon a legal title. When it is not founded on a legal title, even though a third person enters into a transaction with the person entitled on the face of the Register, under the mistaken belief that he is really the person entitled, such third person acquires no right as the result of the transaction except, of course, a claim for damages.

SUB-SECTION 2.

GENERAL PROVISIONS.

1. *Rights and matters which are registrable.*—Registration must be made of the creation, preservation, transfer, restriction of disposal, or extinction, of any of the following rights in real estate—viz.—(1) ownership, (2) superficies, (3) emphyteusis, (4) servitudes, (5) preferential rights, (6) pledges, (7) mortgages and (8) leases (*Registration Law*, Art. 1).

2. *Classes of registrations.*—Registrations include (1) definite registrations and (2) preparatory registrations. Definite registrations (*hon-tōki*) are registrations of facts completed, and which are made in order to attain the proper and essential object of registration. They comprise (a) registrations proper, (b) registrations of rectification, (c) registrations of cancellation and (d) registrations of restoration (that is, registrations by which registrations once cancelled are brought into existence again).

Preparatory registrations (*jumbi tōki*) are made by way of preparation for definite registrations, and also for the purpose of securing a prior rank for the latter. They comprise (*a*) provisional registrations and (*b*) warning (preliminary) registrations.

A provisional registration (kari tōki) (Art. 2) is made :—

1. When definitive registration cannot be obtained because of the non-fulfilment of a formal condition, as when the person bound to make registration does not perform his duty, or a document which ought to be annexed to the application is wanting ;
2. When it is desired to preserve a claim relating to the creation, transfer, alteration or termination of ownership or any other right above enumerated in real estate, as when it is promised that a certain lot of land shall be sold at a certain future date. When a provisional registration has been made, the rank of the definitive registration is governed by the rank of the provisional registration (Art. 7, 2).

A warning (preliminary) registration (yokoku tōki) is made (Art. 3) :—

1. When an action has been brought for the cancellation of a registration on the ground of the invalidity or rescission of the ground of registration (*tōki gen-in*; this term denotes the act or fact, such as sale or succession, which forms the cause for which the particular registration is required);
- (2) When an action has been brought for the restoration of a cancelled registration on the ground of the invalidity or rescission of the ground of registration (of such cancellation);

A warning (preliminary) registration is made in order to warn third persons that the particular registration made or cancelled is liable to be cancelled or restored. In case an action has been brought for the cancellation or restoration of a registration because of the *invalidity* of the ground of registration, a

warning (preliminary) registration must invariably be made; but in case an action is brought for the cancellation or restoration of a registration by reason of the *rescission* of the ground of registration, it is necessary to make a warning (preliminary) registration only when such rescission can be set up against third persons, because if the rescission cannot be set up against third persons—as in the case of an expression of intention made as the result of fraud*—there is no fear of damage being done to them.

A warning (preliminary) registration is made at the request of the Court of the suit (Art. 34).

Registrations may also be classified into (1) principal registrations (*shū-tōki*) which exist by themselves (as a registration of ownership acquired by title of sale) and (2) accessory registration (*fuki-tōki*) which are made in order to cause the latter to continue in existence subject to partial modifications—such as alterations in rights registered (Art. 56), alterations in the designation of persons entitled (Art. 58, 1), rectifications of registrations owing to errors or omissions (Art. 64), and restoration of registrations partially cancelled (Art. 66).

The rank of an accessory registration is determined by the rank of the principal registration, but as between themselves the rank of accessory registrations is determined by their order in time (Art. 7, 1).

3. *Relative effect of registrations.*—The rank of registered rights in the same real estate is determined by the order in time of their registrations, and the order of registrations made in the same section of a registry folio is governed by the rank numbers, and that of registrations made in different sections by the reception numbers (Art. 6).

* The rescission of an expression of intention made as the result of fraud cannot be set up against third persons in acting good faith (*Civil Code*, Art. 97, 3).

SUB-SECTION 3.

REGISTERS AND REGISTRARS.

1. *The Competent Registry Office* for a registration is the Local Court, or the branch thereof, having jurisdiction over the place where the real estate which is the subject-matter of the right to be registered is situated (Art. 8, 1); but when the real estate extends over the districts of two or more Registry Offices, the competent Registry Office is, on the application of a person interested, determined by the next higher Court which has jurisdiction over the several Registry Offices (Art. 8, 2). In case, however, the immovable extends over districts under the jurisdiction of two or more branches of the same Local Court, the question of competency is determined, not by the Local Court (because it is not the next higher Court in respect to its branches) but by the District Court having jurisdiction over the Local Court.

2. *Formalities to be observed by Registrars when registering matters in which they or their wives or relations within the fourth degree of relationship are applicants* (Art. 12):—

- (1) Registration must be made in the presence of two outsiders of full age already registered in the same Registry Office;
- (2) The Registrar must make a protocol and sign and seal it together with the persons assisting.

3. *Responsibility of Registrars for damages caused by them*.—A Registrar is responsible for damages only when they have been caused by bad faith or gross negligence on his part (Art. 13).

4. *Classes of Registers and their form and make up*.—Registers (*tōkibo*) are classified into (1) Land Registers (*tochi tōkibo*) and (2) Buildings Registers (*tatemono tōkibo*) and in both cases a volume is kept for each of the hitherto existing districts of a city, or for each town or village; but in the case of a large town or village, in respect to which numerous registrations are

required, a separate volume *may* be kept for each ūaza* or other hitherto existing district (Art. 14).

5. *Certified copies, extract copies, inspection of entries, etc.* Upon payment of a prescribed fee, any person may apply for the grant of a certified copy of, or extract from, entries in the Register, or may inspect the Register and accessory documents in so far as the part in which he is interested is concerned (Art. 21), because registration being a condition on which the acquisition or loss of, or alteration in, rights in real estate can be set up against third persons, it is essential that a means should be provided by which third persons can freely ascertain what registrations are made in respect to a given lot of land or building. Applicants can demand that copies or extracts be posted to them on payment of the fee and the postage.
6. *Removal of Registers and papers from Registry Offices.* This is forbidden except to avoid destruction by fire, etc.; but applications and documents appertaining thereto may be produced to a Court by way of proofs in compliance with an order or requisition from the Court or examining judge (Art. 22).
7. *Destruction or loss of Registers, and procedure for their replacement.* When a Register is wholly or partly destroyed, if an application is made within a certain period for the restoration of a registration, the latter continues to hold the same rank in such Register. The period in question must be fixed so as not to fall short of three months, and must be publicly notified by the Minister of Justice (Art. 23).

* A town or village is in the first place divided into two or more ūaza.

SUB-SECTION 5.

PROCEDURE OF REGISTRATION (*tōki tetsuzuki*).

1. *Applicants and applications.* An application for registration must, as a rule, be made by the person who is directly benefited by the matter to be registered—that is, the person entitled to registration (*tōki-kenrisha*) and the person who is directly affected by the matter to be registered—that is, the person bound to make registration (*tōki-gimusha*), or their representatives, who must appear in the Registry Office for the purpose (Art. 26). To this rule, however, there are the following exceptions :—

- (1) For a registration on the ground of a judgment or succession, an application may be made by the "person entitled to registration" alone (Art. 27);
- (2) For a registration of a change in the designation (such as a change in the name or domicile) of a person in whose name a registration is made, an application may be made by the sole act of such person (Art. 28);
- (3) In case a Register is wholly or partly lost, an application for the restoration of a registration may be made by the sole act of the person entitled to registration (Art. 69);
- (4) The same applies to a registration of a transfer of ownership of land by reason of expropriation (Art. 103).

2. *Provisional registration.* The procedure involved differs according to whether the consent of the person bound to make registration is or is not obtained; for this reason the subject must be considered under two separate heads :—

- (a) When the consent of the person bound to make registration is not obtained (which is usually the case), (1) the person entitled to provisional registration must

apply to the Local Court having jurisdiction over the place of the real estate which forms the subject-matter of the right to be registered, and (2) when the person entitled has proved the ground of provisional registration, the Local Court must forthwith make a requisition for provisional registration to the Registry Office, such requisition to be accompanied by an exemplification of an order for the provisional disposition; if the party fails to prove the ground of provisional registration, his application must, of course, be rejected; but against such ruling immediate complaint may be made (Art. 32);

- (b) When the consent of the person bound to make registration is obtained, it is not necessary for the person entitled to registration to apply to the Local Court for an order for provisional disposition, but he may himself apply to the Registry Office for the provisional registration; to such application, however, must be annexed a document embodying the consent of the person bound (Art. 33).
- 3. *Warning (preliminary) registration.* A warning registration being made for the protection of third persons, as we have already seen, there can be neither person entitled to nor person bound on, registration. On receipt of an action for the cancellation or restoration of a registration by reason of the invalidity or rescission of the ground of registration, therefore, the Court must forthwith, and *ex officio*, make a requisition for a warning registration, such requisition to be accompanied by a copy of, or extract from, the paper embodying the suit of the plaintiff (*sojō*) (Art. 34).
- 4. *Contents of applications.* An application for a registration must be signed and sealed by the applicant and must contain the following particulars (Art. 36):—
 - i. The district (*gun*), city (*shi*), ward (*kun*), town (*chō*),

- village (*mura*) and *aza** where the real estate is situated, and the serial number of the land ;
2. The classification and area (in *tan* or *tsubo*) of the land, or, if the subject-matter of the right to be registered is a building, its nature, construction, area and serial number (if any) must be stated ; and if there is any accessory building, its nature, construction and area must also be inserted (Art. 37) ;
 3. The name and domicile of the applicant, or the name and office if the applicant is a juridical person ;
 4. If the application is made by a representative, his name and domicile ;
 5. The ground of registration and the date thereof ; if in the ground of registration there is a special agreement for repurchase, or any other clause relating to the termination of the right forming the subject-matter of registration, such fact (Art. 38) ; if there are two or more persons entitled to registration and their respective shares are fixed, such shares (Art. 39) ;
 6. The subject-matter of the registration (that is, the nature of the matter to be registered as, for example, the transfer of ownership or creation of a superficies, etc.) ;
 7. The name of the Registry Office to which the application is made ;
 8. The date of the application.
5. *Ancillary papers.*—To an application must be annexed the following papers (Art. 35, 1) :—
1. A document showing the ground of registration ; if there has never been any document showing the ground of registration, or if such document cannot be submitted, a duplicate of the application (Art. 40) ;
 2. The certificate of registration of the right of the person bound to make registration (the right of the seller, for

* An "*Aza*" is a sub-section of a town or village. It is called "*O-aza*" (great *aza*) if it itself is again divided into several *aza*.

- example); if such certificate has been destroyed, a document in duplicate by which two or more persons (of full age already registered in the same Registry Office) guarantee the identity of the person bound to make registration (Art. 44);
3. Where the permission, consent or approval of a third person is required in respect to the ground of registration (as when a minor does a juristic act, or a lessee sub-lets the thing rented, etc.), a document showing that such permission, etc. has been obtained; but this document may be dispensed with by causing such third person to affix his signature and seal to the application (Art. 45); the documents mentioned in Nos. 2 and 3 need not be submitted if the document showing the ground of registration is a judgment which can be immediately executed (Art. 35, 2);
 4. If the application is made by a representative, a document showing his authority as representative.

In addition to the above, a special document must be annexed under special circumstances. For example; (*a*) if the ground of registration is succession, a document from the Registrar of Family Registries showing such succession, or some other equivalent document (Art. 41); (*b*) If the applicant is the heir of the person originally entitled or bound to make registration, a document from the Registrar of Family Registries showing his heirship, or some equivalent document (Art. 42); (*c*) To an application for the registration of a change in the designation of a person registered, a document from the Registrar of Family Registries showing such change, or some equivalent document must be annexed (Art. 43).

6. *Rejection of applications.*—In any of the following cases the Registrar must reject the application by a ruling (*kettei*) stating the grounds of his decision; but this does not apply if the defect in the application be amended and the applicant amends it on the same day (Art. 49):—

1. If the matter does not belong to the jurisdiction of the Registry Office ;
2. If the matter is not proper to be registered ;
3. If the parties concerned do not appear before the Registrar ;
4. If the application does not comply with the prescribed forms ;
5. If the designation of the real estate, or of the right forming the subject-matter of registration mentioned in the application, conflicts with entries in the Register ;
6. If the designation of the person bound to make registration mentioned in the application does not agree with entries in the Register, except where the application is made by the heir of such person ;
7. If the particulars specified in the application do not agree with the contents of the document showing the ground of registration ;
8. If the necessary documents or plans are not annexed to the application ;
9. If the registration tax is not paid.

7. Return of papers to applicants subsequent to registration.—On the completion of a registration, whether made on the application of the parties or on the requisition of a public office, the Registrar must adopt the following measures (Art. 60) :—

- (1) On the document showing the ground of registration, or on the duplicate of the application, the Registrar must mark the registration number, the date of the reception of the application, the reception number, the rank number, and the fact of the registration having been completed, and after having affixed the seal of the Registry Office must return the document to the person entitled to registration (this being what is referred to as a "certificate of registration" *tōki-zumi-shō*) ;
- (2) On the certificate of registration of the right of the

person bound to make registration, or on one of the documents in duplicate guaranteeing the identity of such person, the date of the reception of the application and the reception number, the rank number, the name and domicile of the person entitled to registration, the ground of registration and its date, the subject-matter of the registration and the fact of the registration having been completed, must be marked, and the seal of the Registry Office affixed, and then the document must be returned to the person bound to make registration. If, however, there are two or more persons registered, and the person bound to make registration is a part thereof, his name and domicile also must be marked on the document. This applies when one or more only of the co-owners of a right has (or have) transferred his (or their) share(s). If there are several persons entitled, or bound to make, registration, it is sufficient to enter the name and domicile of the one who is first mentioned in the application and the number of the other persons.

8. Persons entitled to make original registration of lands and buildings.

(1) An application for the registration of the ownership of land not yet registered can be made by the following persons (Art. 105):—

(a) A person who shows by a copy of entries in the Cadastre (*Tochi-Daichō*) that he, or his ancestor (predecessor), is registered as owner in such book;

(b) A person whose right as owner is proved by a judgment;

(2) An application for the registration of the ownership of a building not yet registered can be made by the following persons:—

(a) A person who is registered in the Register as the owner or superficiary of the land on which the building stands;

- (b) A person who proves by a copy of entries in the Cadastre that he himself or his ancestor (predecessor) is registered in such book as owner of the land on which the building stands;
- (c) A person whose ownership is proved by a certificate from the owner or superficiary of the already registered land on which the building stands;
- (d) A person whose ownership is proved by a judgment or by another document of a Government or public office.

9. *Matters to be mentioned in applications for registration of preservation of a preferential right for work involved in the construction of a new building.**—An application for the registration of preservation of such preferential right must contain the following particulars—of course, in addition to the particulars to be mentioned in applications in general—and be accompanied by specifications and plans (Art. 136):—

- (1) The district, city, ward, town, village, *aza* where the building is to be erected, and the serial number of the land;
- (2) The nature, construction and area of the building as fixed in the specifications;
- (3) The estimated cost of the work;
- (4) If the time of performance is provided in the ground of registration, such provision.

10. *Cases in which a person entitled to registration may apply alone for cancellation of registration* are:—

- (1) If a registered right is extinguished by the death of a person (as when the superficiary dies in the case of a superficies created for his life), the person entitled to registration may by himself apply for the cancellation

* Civil Code, Art. 338, I provides: "A preferential right for works relating to immovables preserves its validity by registration being made of the estimated cost previous to the commencement of such works; but when the cost of the work exceeds the estimate, no preferential right exists with regard to such excess."

of the registration, attaching to the application a document from the Registrar of Family Registries or any other publicly authenticated document proving such death (Art. 141);

- (2) If the person entitled to registration does not know the whereabouts of the person bound to make registration, and therefore cannot make the application jointly with such person, he may apply for a public summons to such person in accordance with the *Code of Civil Procedure* (*vide* Chapter 8, Section 5) and then apply for the cancellation of the registration; the latter application to be accompanied by a copy of the judgment of exclusion (*joken hanketsu*) obtained from the Court (Art. 142, pars. 1 and 2);
- (3) If the whereabouts of the person bound to make registration is unknown, the person entitled to registration may, in so far as a registration relating to a preferential right, pledge, or mortgage is concerned, apply for the cancellation of the registration immediately—that is, without awaiting a judgment of exclusion—annexing to the application the document creating the obligation (secured by such preferential right, etc.), and the receipts for its performance and for the periodical payments (interest, for example) for the two years preceding the performance (Art. 142, 3).

11. *Persons who may apply for cancellation of a provisional registration.* An application for the cancellation of a provisional registration may be made by the person in whose favour such provisional registration was made (Art. 144, 1), because if the party for whose protection such registration was made deems it no longer necessary to enjoy the benefit, it is unnecessary for the law to prevent him from waiving it.

For the same reason, any other person interested in such registration may apply for the cancellation thereof, annexing to

the application a document showing the consent of the person in whose favour the registration was made, or a copy of a judgment which may be set up against him (Art. 144, 2).

12. Cases where, and procedure according to which, a warning (preliminary) registration is cancelled.—When any of the following facts occurs in regard to an action for the cancellation or restoration of a registration by reason of the invalidity or rescission of the ground of registration, it is no longer necessary that third persons should be warned of danger, and therefore the warning (preliminary) registration must be cancelled (Art. 145):—

- (1) If the action is dismissed;
- (2) If the judgment against the plaintiff becomes final and conclusive;
- (3) If the action is withdrawn;
- (4) If the claim is waived;
- (5) If a compromise is effected with regard to the subject-matter of the claim.

In any of such cases, a requisition for the cancellation of the warning (preliminary) registration must be made to the Registry Office by the Court of first instance, such requisition being accompanied by a copy of, or extract from, the judgment, or a document from the clerk of the Court showing the withdrawal of the action, the waiver of the claim, or the compromise.

SUB-SECTION 5:

COMPLAINT (*kōkoku*).

1. Cases where complaint can be made.—A complaint (which is a kind of appeal) can be made against a ruling or disposition of a Registrar (Art. 150). It is by a ruling (*kettei*) that an application for a registration is rejected for some reason (Art. 49, etc.) A “disposition” (*shobun*) of a Registrar may refer to any other measure which is adopted by a Registrar in connection with registration business—such as a refusal to permit an inspection of the Registrar or to deliver a copy of, or extract

from, entries in the Register, or an order to supplement or alter an application, etc.

2. *Persons entitled to complain.*—Art. 150 provides that any person who finds a ruling or disposition of a Registrar improper may make a complaint; but this does not mean that any and every person who is of that opinion may complain, but that any person who has a *lawful interest* in asserting the impropriety of a ruling or disposition of a Registrar may make complaint.

3. *Procedure for complaint.*—Complaint is to be made in writing addressed to the competent Court—that is, the District Court having jurisdiction over the place of the Registry Office by a Registrar belonging to which the ruling or disposition attacked has been made, but it is to be filed, not with the said District Court, but with the Registry Office by a Registrar belonging to which the measure attacked has been adopted—in order that the Registrar may have an opportunity to re-consider the matter (Art. 151 and 153).

4. *Restriction on means of proof for complaint.*—A complaint cannot be based on new facts or new evidence (Art. 152). A Registrar having only power to make inquiries into matters of form—that is, the facts and evidence which have been produced before him—the question of whether his act is proper or improper should also be decided in the light of such facts and evidence only.

5. *Disposition to be made on receipt of complaint.*

(1) If the Registrar believes the complaint to be well founded he must make the necessary dispositions forthwith and without awaiting a ruling of the Court of Complaint. But if a complaint is made after the completion of a registration, he must enter, by an accessory registration, that objection has been made to such registration, and give notice of the fact to the persons interested in the registration and submit the matter to the Court of Complaint within three days, adding a statement of his own opinion (Art. 153, 2),

because a registration once completed cannot be cancelled at the discretion of the Registrar even though such registration ought not to have been made.

2. If the Registrar considers the complaint to be unfounded, he must, within three days, submit the matter to the Court of Complaint, adding a statement of his own opinion (Art. 153, 1).

6. *Effect of complaint.*—A complaint has no force to suspend the execution of the ruling or disposition attacked (Art. 154, 1)—that is—even though a complaint has been made the Registrar must proceed to register what he deems proper to register and leave unregistered what he considers ought not to be registered because despatch is of great importance to registration business; but should the Court of Complaint consider that there is sufficient ground for taking such a course, it may order the Registry Office to make a provisional registration before it duly proceeds to adjudicate upon the complaint (Art. 154, 2).

7. *Whether objection can be made to a ruling of the Court of Complaint.*—It is a rule in the law of procedure that complaint can be made only once. The same applies to complaint against a ruling or disposition of a Registrar, it being permitted to make a further complaint against a ruling of the Court of Complaint only when the latter is contrary to law (Art. 158, 1).

SECTION 2.

COMMERCIAL REGISTRATION.

SUB-SECTION 1.

GENERAL PROVISIONS.

1. *The Competent Registry Office* for a commercial registration—that is—a registration to be made in accordance with the provisions of the *Commercial Code*, is the Local Court, or the branch office thereof, having jurisdiction over the place of the

business premises of the applicant (Art. 139 of the *Law of Procedure in Non-contentious Matters*).

2. *Classes of Commercial Registers*.—In each Registry Office must be kept the following Commercial Registers (*shōgyō tōkibō*) (Art. 140):—

1. A register of trade names ;
2. A register of minors ;
3. A register of married women ;
4. A register of legal representatives ;
5. A register of procurators ;
6. A register of ordinary partnerships ;
7. A register of limited partnerships ;
8. A register of joint-stock companies ;
9. A register of joint-stock partnerships ;
10. A register of foreign companies.

3. *Copies of, and extracts from, and inspection of, entries in Registers*.—Any person may inspect Registers and, on paying a prescribed fee, obtain a copy of, or extract from, entries in a Register (Art. 142, 1). The Registry Office must also, on application, grant a certificate that there is no alteration in a certain fact registered or that a certain fact is not registered (Art. 143). A fact registered is published at least once in the Official Gazette and in certain newspapers published within the jurisdiction of the competent Local Court (Art. 144, 1).

4. *Applications*.—Except as otherwise provided, the registration of a fact to be registered, and of its alteration or termination, is made on the application of the party (parties) concerned (Art. 147). An application for registration must be made in writing and must contain (Art. 149):—

1. The name and domicile of the applicant, or, if the applicant is a company, its trade name and principal or branch office ;
2. If the application is made by a representative, his name and domicile ;

3. The subject-matter and the grounds of the registration ;
4. The date ;
5. The name of the Registry Office ;
6. The signature and seal of the applicant or his representative.

5. *Ancillary documents.*—To an application for registration must be annexed (1) the document of permission from the authorities (or a certified copy thereof) if the permission of the of the authorities is required in respect to the fact to be registered (Art. 150 (2)), (2) a document showing that the registration has been made at the place of the principal office when applying at the place of a branch office for the registration of a fact which is required to be registered at the place of the principal office and of each branch office (Art. 150 (3)), and (3) other special papers under special circumstances.

6. *Rejection of applications.* If an application for registration contravenes the provisions of the *Commercial Code* or of the *Law of Procedure in Non-contentious Matters* relating to commercial registration, the Registry Office must reject it by a ruling (*kettei*) accompanied by reasons ; against such ruling immediate complaint may be made (Art. 151).

7. *Cancellation of registrations.*—In the event of the Registry Office finding that a registration already made is legally impermissible, notice is to be given to the party in whose favour such registration has been made to the effect that if no objection be made within a specified period (to be fixed by the Registry Office in so far as it does not fall short of two months) the registration will be cancelled, or public notification must be made to the same effect if his whereabouts is unknown (Art. 151 (2), 1 and 2). If an objection is made in time, the Registry Office must adjudicate upon it by a ruling accompanied by reasons (against which ruling immediate complaint may be made and such complaint has the effect of suspending the execution of the judgment) (Art. 151 (3)). If no objection is made in time, or the judgment rejecting the objection has become final and con-

clusive, the registration is to be cancelled *ex officio* by the Registry Office (Art. 151 (4)).

8. *Effect of commercial registration.*—For this and other details, see under the *Commercial Code* (*Chapter 6*).

SUB-SECTION 2.

REGISTRATION OF TRADE NAMES.

1. *Registrable trade names.*—A trade name can be registered only if it is plainly distinguishable from any trade name already registered for another person for the same kind of business in the same city, town or village (Art. 158); but an exception is recognized in respect to trade names which have been in use since prior to the enforcement of the old *Commercial Code*, that is, prior to the 1st July, 1898 (*Law Concerning the Application of the Commercial Code*, Art. 13, 1). A person who applies for the registration of such an old trade name must prove that the particular trade name has been in use since prior to the date above specified (Art. 159).

2. *Applications.*—In an application for the registration of a trade name or of an alteration therein, the nature of the business must be stated in addition to those which are to be inserted in applications in general (see No. 4 of the foregoing Sub-section) (Art. 160).

3. *Abandonment or alteration of a trade name.*—When a trade name is abandoned or altered, the party must apply for the registration thereof; when the heir or legal representative of the party makes such application, a document showing his quality as such must also be annexed to the application.

SUB-SECTION 3.

REGISTRATION OF MINORS, MARRIED WOMEN AND LEGAL REPRESENTATIVES.

1. *Registration of minors.*—A minor is incapacitated, but when he is permitted (by his legal representative) to carry on

a business or profession he has the same legal capacity as if he was a person of full age (*Civil Code*, Art. 6); when a minor carries on a commercial business, registration must be made (*Commercial Code*, Art. 5). In an application for such registration the nature of the business must be specified, and a document showing that the consent of the legal representative has been obtained annexed, unless the latter also signs the application (Art. 166, 1).

When the legal representative has cancelled or restricted his permission for the minor to carry on a commercial business, an application must be made for the registration of the fact forthwith (Art. 168, 1).

2. *Registration of married women.* We have already seen that a married woman is legally incapacitated to a certain extent; but when she is permitted by her husband to carry on a business or profession she has the same legal capacity as an independent person in so far as such business, etc., is concerned (*Civil Code*, Art. 15); when a married woman carries on a commercial business, registration must be made (*Commercial Code*, Art. 5). In an application for such registration, the nature of the business must be specified, and also a document, showing that the permission of her husband has been obtained, annexed, unless the latter also signs the application (Art. 167, 1). When the husband has cancelled or restricted his said permission he must apply for the registration of the fact forthwith (Art. 168).

If a married woman who has registered an agreement differing from the legal arrangement as to matrimonial property (see pp. 373-4) applies for the registration of a commercial business, or if subsequent to such registration a change of managers of the matrimonial property or a partition of the common (matrimonial) property is registered, the fact must be notified to the Registry Office in writing, in which case the latter must add that fact to the commercial registration of the party concerned (Art. 170).

3. *Registration of legal representatives.* When a legal representative of an incapacitated person carries on a commercial business for the incapacitated person with the consent of the family council, registration must be made (*Commercial Code*, Art. 7, 1). In an application for such registration, the fact of his being the legal representative must be stated, and a document showing that the consent of the family council has been obtained must be annexed (Art. 171).

SUB-SECTION 4.

Registration of Procurators and of Liquidators of a Company.

1. *Registration of procurators.* A procurator (*shihai-nin*) is appointed by a trader and possesses authority to do, in the place of the principal, all transactions in or out of Court relating to the principal's business, and also to appoint and dismiss trade assistants and employees (*Commercial Code*, Art. 30). It is thus a matter of prime importance that the fact of the appointment of a procurator, who possesses wide powers, should be published in a reliable manner. An application for the registration of the appointment of a procurator is to be made by the principal; if the principal is a company, by the partners or directors who are empowered to represent the company (Art. 172). Such application must contain, in addition to the particulars to be inserted in applications in general (Art. 173, 1):—

- (1) The name and domicile of the procurator;
- (2) If the applicant (principal) carries on different kinds of businesses under different trade names, the business in connection with which the procurator is to be employed and its trade name;
- (3) The place (office) at which the procurator is to be stationed;
- (4) If it is determined that several procurators shall exercise

the power of representation conjointly, the provision relating to such representation.

When the applicant is a company, the date of its formation must also be stated in the application, and documents showing the appointment of the procurator (s), and that the right of representation is to be exercised conjointly by several procurators (if such is the case), must be annexed (Art. 173, 2).

On the termination of or an alteration in the authority of a procurator also, an application for the registration must be made by the same person (s) who is (are) bound to apply for the registration of his appointment (Art. 174).

2. Registration of liquidators (of a company). Art. 90 of the *Commercial Code* provides that when liquidators have been appointed, they must, within two weeks, register at the place the principal office and of each branch office the following particulars :—

- (1) The names and domiciles of the liquidators ;
- (2) If the liquidators who are to represent the company have been designated, their names ;
- (3) If it is provided that two or more liquidators are to represent the company in common, the provision relating to such representation.

To an application for the registration of the appointment of liquidators must be annexed documents showing their appointment and the matters mentioned in (2) and (3) above. An application for the registration of an alteration in any of the matters mentioned in (1), (2) and (3) is to be made by the new liquidators empowered to represent the company, and to such application must be annexed a document showing the said alteration (Art. 177). On the termination of the liquidation, the liquidators must forthwith register the fact at the place of the principal and of each branch office (*Commercial Code*, Art. 99). To an application for such registration must be annexed a document showing that their accounts have been approved of by the company (Art. 178).

SUB-SECTION 5.

REGISTRATION OF ORDINARY PARTNERSHIPS AND
LIMITED PARTNERSHIPS.

1 *Formation.*—An application for the registration of formation is to be made by all the partners in the case of an ordinary partnership, and by all the partners with unlimited liability in the case of a limited partnership. The matters to be registered in the case of an ordinary partnership are (*Commercial Code*, Art. 51) :—

- (1) The object ;
- (2) The trade name ;
- (3) The name and domicile of each partner ;
- (4) The principal and branch offices ;
- (5) The date of formation ;
- (6) If a time of duration or causes for dissolution are fixed, such time or causes ;
- (7) The nature of the contribution of the partners and the value of any contribution of which the subject is property ;
- (8) If the partners who are to represent the partnership have been designated, their names ;
- (9) If it is provided that two or more partners, or a partner and a procurator, are to represent the partnership in common, the provisions relating to such representation.

In the case of a limited partnership, a statement of whether the liability of each partner is limited or unlimited must be added to the above (*Commercial Code*, Art. 107).

To such application must be annexed the partnership contract, and if there is any minor or married woman among the partners, also a document showing that he or she has been duly permitted to become a partner (Art. 179, 2 and Art. 186).

2. *Establishment of a branch, removal of the principal or a branch office, or other changes.*—An application for such registration is to be made by all the partners empowered to represent

the partnership ; if the consent of all the partners, or of a certain number of partners, is required in respect to the fact to be registered, a document showing such consent must be annexed to the application, but this applies only when certain partners have been appointed to represent the partnership (Art. 180, 1 and 2 and Art. 186).

3. *Dissolution.*—An application for the registration of dissolution is to be made by all the partners (or their heirs) in the case of an ordinary partnership, and by all the partners with unlimited liability (or their heirs) in the case of a limited partnership ; in the application the cause of the dissolution must be stated, and, if an heir is among the applicants, a document showing his quality must be annexed ; if a partnership is dissolved by an order of a Court, the Registry Office must register such dissolution on the requisition of the Court (Arts. 181 and 186). Any partner may apply to a Court for the dissolution of the partnership (*Commercial Code*, Art. 83 and 105), in such case any partner may apply for the registration of the dissolution of the partnership annexing a copy of the judgment of dissolution (Arts. 184 and 186).

4. *Change of organization.*—An application for the registration of a conversion of an ordinary partnership into a limited partnership is to be made by all the partners with unlimited liability so far as the limited partnership is concerned ; in such application the fact of the change of organization must be stated, and it must be accompanied by the partnership contract, and if one or more partners with limited liability have been admitted, also by a document showing the fact (Art. 184 (4)). Of course a registration of dissolution must be made in regard to the ordinary partnership in the usual manner. An application for the registration of a conversion of a limited partnership into an ordinary partnership is to be made by all the partners so far as the ordinary partnership is concerned ; in such application the fact of the change of organization must be stated and the partnership contract annexed (Art. 185 (2)).

SUB-SECTION 6.

REGISTRATION OF JOINT-STOCK COMPANIES.

1. *Formation.*—An application for the registration of a joint-stock company is to be made by all the directors and all the inspectors (Art. 187, 1) and the matters to be registered are (*Commercial Code*, Art. 141, 1), :—

- (1) The object ;
- (2) The trade name ;
- (3) The total amount of the capital ;
- (4) The amount of each share ;
- (5) The manner in which the public notifications of the company are made ;
- (6) The principal and branch offices ;
- (7) The date of formation ;
- (8) If the term of duration or any cause for dissolution is fixed, such term or cause ;
- (9) The amount paid on each share ;
- (10) If it has been determined that interest shall be paid before the commencement of business, the rate of interest ;
- (11) The names and domiciles of the directors and inspectors ;
- (12) If directors who are to represent the company have been designated, their names ;
- (13) If it is provided that two or more directors, or a director and procurator, are to represent the company conjointly, the provisions relating to such representation.

The application must be accompanied by (Art. 187) :—

- (1) The company contract ;
- (2) A document showing that the shares have been taken ;
- (3) Instruments of subscription for shares ;
- (4) The report of the directors and inspectors or examiners on their examination into whether the whole number

of shares have been taken, whether full, or the first, payment has been paid on each share, etc. (*Commercial Code*, Art. 134), and documents accessory thereto;

- (5) If a judgment has been rendered on the report of the examiners, a copy thereof;
- (6) If the promoters have appointed directors and inspectors, documents relating to such appointment;
- (7) A record of the resolutions of the general meeting for organization.

2. Establishment of a branch office, removal of the principal or a branch office or other changes.—An application for the registration hereof is to be made by all the directors; if a resolution of a general meeting is required in respect to the fact to be registered, a record of such resolution must be annexed to the application (Art. 188, 1 and 2).

3. Increase or reduction of capital.—To an application for the registration of an increase of capital, the following must be annexed (Art. 189):—

- (1) A document showing that the (new) shares have been taken;
- (2) Instruments of subscription for shares;
- (3) The report of the inspectors or examiners on their examination into whether the whole number of shares have been taken, whether full, or the first, payment has been made on each share, and the documents accessory thereto;
- (4) A record of the resolutions relating to the increase of the capital.

To an application for the registration of a reduction of the capital must be annexed a record of the resolutions of the general meeting of the shareholders relating thereto, and also documents showing that public and private notices have been given to creditors to present their objection, and that payment has been made, or security furnished, to objecting creditors.

as required by Art. 78, 2 of the *Commercial Code* (Art. 190).

An application for the registration of an increase or reduction of the capital is to be made by all the directors and all the inspectors (Art. 195).

4. *Debentures*.—An application for the registration of debentures is to be made by all the directors. The matters to be registered are (*Commercial Code*, Art. 204 (3), 1):—

- (1) The total amount of the debentures;
- (2) The amount of each debenture;
- (3) The rate of interest on debentures;
- (4) The manner and time of repayment of the debentures;
- (5) The amount paid on each debenture.

To the application must be annexed (Art. 191):—

- (1) The last balance-sheet;
- (2) A document showing that the debentures have been taken;
- (3) Instruments of subscription for debentures;
- (4) Documents showing that full, or the first, payment has been made on each debenture;
- (5) A record of the resolutions of the general meeting of shareholders relating to the invitation to subscription for debentures.

An application for the registration of an alteration in debentures must be made by all the directors who are empowered to represent the company, such application to be accompanied by a document showing the fact of the alteration (Art. 192).

5. *Dissolution*.—An application for the registration of the dissolution of a joint-stock company is to be made by all the directors and all the inspectors (Art. 195), and it must state the cause of the dissolution and must be accompanied by a record of the resolutions of the general meeting relating to it in case the company is dissolved either by a resolution of a general meeting or by consolidation (Art. 193, 1). When the company is

dissolved by an order from a Court, the Registry Office must register such fact on the requisition of the Court (Art. 193, 3).

SUB-SECTION 7.

REGISTRATION OF JOINT-STOCK LIMITED PARTNERSHIPS.

1. *Formation.* An application for the registration of the formation of a joint-stock limited partnership is to be made by all the partners with unlimited liability and all the inspectors (Art. 196, 1). The matters to be registered are (*Commercial Code*, Art. 241) :—

- (1) The object ;
- (2) The trade name ;
- (3) The amount of each share ;
- (4) The manner in which the public notifications of the partnership are made ;
- (5) The principal and branch offices ;
- (6) The date of formation ;
- (7) If the term of duration, or any cause for dissolution, is fixed, such term or cause ;
- (8) The amount paid on each share ;
- (9) If it has been determined that interest shall be paid before the commencement of business, the rate of interest.

The application to be accompanied by (Art. 196, 2) :—

- (1) The partnership contract ;
- (2) A document showing that the shares have been taken ;
- (3) Instruments of subscription for shares ;
- (4) A report of the inspectors on their examination into whether the whole number of shares has been taken, whether full, or the first, payment has been made on each share, etc. (see *Commercial Code*, Art. 241) ;
- (5) A record of the resolutions of the general meeting for organization ;
- (6) If there is any minor or married woman among the partners, a document showing that he or she has been duly permitted to become a partner.

2. *Establishment of branch offices, removal of the principal or a branch office, or other changes.* An application for the registration hereof is to be made by all the partners with unlimited liability who are empowered to represent the partnership (Art. 197, 1). If a resolution of a general meeting of shareholders is required in respect to such application, a record of such resolution is to be annexed to the application ; and if the consent of all the partners, or certain partners, is required, a document showing such consent must also be annexed ; but this applies only when certain partners have been appointed to represent the partnership (Art. 197, 2).
3. *Increase or reduction of capital.* These are governed by the same provisions as those relating to the increase or reduction of the capital of a joint-stock company sketched above, subject to certain modifications necessitated by the difference in nature between the two kinds of companies (Art. 198).
4. *Debentures.* An application for the registration of debentures is to be made by all the partners with unlimited liability accompanied by the same documents as those which are to be annexed to the same application by a joint-stock company (see No. 4 of the foregoing Sub-section) (Art. 198 (2)). An application for the registration of an alteration in debentures is to be made by all the partners with unlimited liability who are empowered to represent the partnership, accompanied by a document showing the fact of such alteration (Art. 198 (3)).
5. *Dissolution.* An application for the registration of the dissolution is, as a rule, to be made by all the partners with unlimited liability (or their heirs) and all the inspectors (Art. 200, 1), the application to be accompanied by a document showing the ground of the dissolution, and if the partnership is dissolved by the

consent of all the partners with unlimited liability and a resolution of a general meeting of shareholders or by consolidation, a record of the resolutions relating to it (Art. 200, 2); and in the case of consolidation also documents showing that public and private notices have been given to creditors to present objections and that payment has been made, or security furnished, to objecting creditors (Art. 200, 3). When the partnership is dissolved by an order from a Court, the registration is to be made by the Registry Office on the requisition of the Court (Art. 200, 4).

6. *Change of Organization.* When a joint-stock limited partnership has been converted into a joint-stock company, a registration of dissolution is to be made by all the partners with unlimited liability and all the inspectors in respect to the joint-stock limited partnership; such application to be accompanied by a record of the resolutions of the general meeting and documents showing that notice has been given to creditors and that payment has been made, or security furnished, to objecting creditors (Art. 200 (2)), whereas in respect to the joint-stock company a registration of formation is to be made by all the directors and inspectors; such application must state the fact of the change of organization and be accompanied by the company contract, a document showing that the shares have been taken, and also a record of the resolutions of the general meeting relating to the change of organization (Art. 201).

SUB-SECTION 8.

REGISTRATION OF FOREIGN COMPANIES.

1. *Establishment of a branch office in Japan.* When a foreign company sets up a branch in Japan, the same registrations and public notifications must be made as in the case of a Japanese

company of the same kind or of the kind most resembling it (*Commercial Code*, Art. 255). An application for such registration must bear the name and domicile of the representative for the branch, and be accompanied by the following documents, duly certified by the competent authorities of the country to which the particular company belongs, or by a Consul of such country residing in Japan (Art. 202), namely :—

- (1) A document calculated to show the existence of a principal office ;
- (2) A document showing the quality of the representative ;
- (3) The company contract or a document calculated to indicate the nature of the company.

2. *Changes in facts registered.*—If a change takes place in the representative for a branch in Japan, the new representative must give notice thereof to the competent Registry Office in the same manner as above (Art. 203). When a branch in Japan is closed, or a change takes place in any of the facts registered in connection with it, an application for the registration thereof is to be made by the representative for the branch (Art. 204, 1). In case the representative for a branch in Japan applies for the registration of a change in a registered fact which has occurred in a foreign country, he must prove the fact of the change by a document certified by the competent authorities of the country to which the company belongs, or by a Consul of such country residing in Japan (Art. 204, 2).

3. *Period for registration.*—In the case of a fact to be registered which occurred abroad, the period for registration is computed as from the time when the notice thereof reaches Japan (*Commercial Code*, Art. 256).

SECTION 3.

CIVIL REGISTRATION.

Civil registration other than detailed in the last section but one—that is, registration of real estate—may be briefly disposed

of, as it concerns only (1) juridical persons (other than companies, of course) and (2) contracts relating to matrimonial property. In each Registry Office must be kept a register of juridical persons and a register of contracts relating to matrimonial property (*Law of Procedure in Non-contentious Matters*, Art. 119). Any person may inspect the Registers, and on paying a prescribed fee obtain a copy of, or extract from, entries therein, etc. just as in the case of Commercial Registers (Art. 125). Facts registered, like those registered in the latter Registers, are to be published at least once in the Official Gazette and certain newspapers published within the jurisdiction of the Court (ditto).

SUB-SECTION I.

REGISTRATION OF JURIDICAL PERSONS.

1. *The Competent Registry Office* for the registration of a juridical person is the Local Court or the branch thereof having jurisdiction over the place of the office of the juridical person (Art. 117).

2. *Formation*.—An application for the registration thereof is to be made, within two weeks from the date of the formation, by all the directors, the application to be accompanied by the Articles of Association, a document showing the quality of the directors as such, and the document of permission from the competent authorities or a certified copy thereof (Art. 117 and *Civil Code*, Art. 45). The matters to be registered are (*Civil Code*, Art. 46):—

- (1) The object;
- (2) The name;
- (3) The office;
- (4) The date of permission for creation;
- (5) When the period of duration is fixed, such period;
- (6) The total amount of capital;

(7) When the method of contributing capital is fixed, such method.

3. *Establishment of an office, removal of the office and other alterations in facts registered.* An application for the registration thereof (which is to be effected within one week) is to be made by the directors, or by the temporary directors if there happens to be no director; to such application must be annexed a document showing the quality of the directors or temporary directors as such (except they have previously applied for a registration to the same Registry Office) and the document of permission or a certified copy thereof if the permission of the authorities is required in respect to the fact to be registered (Art. 121).

4. *Dissolution*—An application for the registration thereof is to be made by the liquidators, such application to be accompanied by a document showing the ground of the dissolution and a document showing the quality of the liquidators as such, except the directors act as liquidators.

5. *Foreign juridical persons*.—The foregoing provisions apply *mutatis mutandis* to foreign juridical persons having branches in Japan (Art. 124).

SUB-SECTION 2.

REGISTRATION OF CONTRACTS RELATING TO MATRIMONIAL PROPERTY.

1. *The Competent Registry Office* for the registration of a contract relating to matrimonial property is the Local Court or the branch thereof having jurisdiction over the place of the domicile of the prospective husband or, if the latter is a 'nyūfu' (a man who marries a woman who is the head of a house and enters that house) or *muko-yōshi* (a man who is adopted and also married to a daughter of the adoptive parents), over the place of the domicile of the prospective wife (Art. 118). Such a

contract must be registered before the notification of the marriage (*Civil Code*, Art. 793 and 794), nor may it be altered subsequent to the notification of the marriage (ditto, Art. 796, 1), though a change of managers and partition of the common property may be effected by judicial intervention under certain circumstances (ditto, Art. 796, 2 and 3); but such change or partition must be registered on pain of its being impossible to set it up against the successors of the husband and wife and also against third persons (ditto, Art. 797). In case foreigners have concluded a contract different from the legal arrangement as to matrimonial property of the home country of the husband, if they acquire Japanese nationality or fix their domicile in Japan subsequent to the marriage, *such contract cannot be set up in Japan against their successors or against third persons unless it be registered in Japan within one year* (ditto, Art. 795).

2. *Applications.* An application for the registration of a contract relating to matrimonial property is to be made by the parties (husband and wife), such application to be accompanied by the written contract relating to the matrimonial property, or a copy of the judgment permitting a change of managers or partition of the common (matrimonial) property, or the written contract relating to such change or partition (Art. 123).

CHAPTER 8.

THE CODE OF CIVIL PROCEDURE.

The Code of Civil Procedure (*Minji Soshō Hō*) is a public law governing the formalities for obtaining remedies from the State for encroachments upon private rights. The organs of the State which are charged with the protection of rights are Courts.

SECTION I.

COURTS.

Courts may be either ordinary or special. Ordinary Courts are Courts which decide civil and criminal causes in general, while special Courts are Courts which have charge of special cases, or cases which, for some reason or other, are not fit to be brought before ordinary Courts.

The power of a Court to render judgments upon cases is known as the jurisdiction (*kwankatsu*) of a Court, which may be either material or territorial. The material jurisdiction (*jibutsu no kwankatsu*) of a Court is the power of a Court which is determined in view of the nature or value of cases. Thus, the Local Courts decide in first instance trivial cases and cases which should be speedily dealt with by a simpler process (*Law of Constitution of the Courts of Justice*, Art. 14 *et seq.*) and so on. (For fuller details of the matter, *vide* Chapter 2.)

The territorial jurisdiction (*tochi no kwankatsu*) of a Court is the power of a Court which is determined by territorial considerations. The territorial jurisdiction of a Court is otherwise known as the "forum" (*saiban-seki*). The forum of a case is, as a rule, determined by the place of the domicile of the defendant, though there are many exceptions to this rule (*Code of Civil Procedure*, Art. 10 *et seq.*). The plaintiff is also permitted to choose between two or more competent Courts (Art. 25). The jurisdiction of a Court may be either exclusive or otherwise. When a Court has an exclusive jurisdiction over a case, the plaintiff is not only not permitted to exercise his choice, but the case cannot be brought in any other Court even by the agreement of the parties (Art. 31).

With a view to assure impartiality in judgment, the Code contains provisions according to which when a judge stands in a certain relation with regard to the case in hand—as, for example, when he himself, or his wife, is the plaintiff or defendant, or is related by blood or marriage to either party or the latter's

spouse, and so on—such judge is, by operation of law, excluded (*joseki*) from the exercise of his functions, and is not permitted to participate in the case; and when a judge is excluded from the exercise of his functions by operation of law, or when there are circumstances forming a sufficient ground of suspicion that he might give a biased judgment, either party may refuse (*kihi*) such judge on showing the ground of such refusal either in writing or verbally. But no party can refuse a judge on the ground of prejudice, if such party, having knowledge of the ground for refusal, has, without asserting the same himself, made applications before such judge, or has replied to applications made by the adversary before such judge. In short, by exclusion, a judge specially interested in the particular case is caused to retire by the Court on its own motion; while by refusal, the Court is required by either party to cause a judge who is specially interested in the case to retire. (Arts. 32-40.) The foregoing provisions also apply *mutatis mutandis* to court clerks (Art. 41).

SECTION 2.

PARTIES.

The parties to a suit (*soshō-tōjūsha*) are (1) the plaintiff (*genkoku*) and (2) the defendant (*hikoku*). Besides these principal and indispensable parties, there may be an accessory party in the shape of a principal intervener (*shu-sanka-nin*, that is, a third person who, having a claim upon the subject-matter in dispute, enforces his claim against both the plaintiff and the defendant [Art. 51]) or an accessory intervener (*jū-sankanin*) (that is, a third person who, having a legitimate interest in the victory of one of the parties joins such party in order to support him [Art. 53]). Any person who can be the subject (holder) of a right under private law can also be a party to a suit. But a person who possesses capacity for being a party to a suit does not necessarily possess "litigation capacity" (*soshō-noryoku*)—that is, capacity to conduct a lawsuit himself or to have it conducted by another—

for it is provided that whether a party has litigation capacity or not is determined in accordance with the provisions of the *Civil Code* (Art. 43). Thus, it may be safely held that litigation capacity is possessed only by a person who possesses full capacity for action under the *Civil Code*. In Japanese law, it is a principle that a civil action should be conducted by the parties themselves (instead of by advocates, as in some countries) : but when another person is caused to conduct a suit (as indeed in the great majority of cases), it must always be conducted by a professional advocate (*bengoshi*) except in regard to a matter which comes under the jurisdiction of a Local Court (Art. 63 *et seq.*). The costs of a suit are, as a rule, to be borne by the party defeated (Art. 72 *et seq.*), but lawyers' fees are not allowed.

SECTION 3.

PROCEDURE.

Procedure (*soshō-tetsuzuki*) means procedure through which an authoritative declaration of a Court is pronounced in regard to a relation of right in dispute between the parties to a suit. The Japanese *Code of Civil Procedure* acts on the principles of (1) judgment according to free conviction, (2) non-interference and (3) oral proceedings. (1) According to judgment according to free conviction, the Court is required to render judgment according to its free conviction founded upon a due consideration of the allegations of the parties (Art. 217). (2) The principle of non-interference means that the matters in the light of which the relation in dispute is determined are confined to those brought forward by the parties, and the Court does not of its own motion interfere with matters other than those brought forward by the parties—in other words, judgment is rendered simply on the basis of the materials furnished by the parties. (3) The principle of oral proceedings is opposed to the principle of documentary examination and is one according to which the Court examines the parties directly and

renders judgment according to its conviction thereby formed (Art. 103). It should, however, be noted that these are the rules which are generally acted on in the Code, and that there are certain exceptions.

Procedure may be either (1) ordinary or (2) special. Ordinary procedure is procedure which is followed under ordinary circumstances, while special procedure is procedure which is applicable where it is necessary to simplify proceedings or settle matters speedily.

SUB-SECTION I.

ORDINARY PROCEDURE.

(1) *Procedure in First Instance.*

There are some differences between procedure in first instance before a Local Court and that before a District Court; but we will here confine ourselves to the procedure before a District Court, inasmuch as the procedure before that Court is to be regarded as typifying the principles governing judicial procedure in general.

An action (*so* or *soshō*) is commenced by the lodging of a written petition (*sojō*) in a Court. The right to present a petition and apply to the Court for the protection of a right is the right of action (*soken*). A right of action need not be necessarily accompanied by a material right. Even where no material right really exists, a person may bring an action if he believes that he possesses a right to be protected. Upon the institution of an action, the Court is placed under an obligation to adjudicate upon the matter and the defendant is bound to act in response to the action. This state of things is known as litispendence (*kenri-kōsoku*). The Japanese law of procedure acts on the principle that litispendence is established by service of the petition upon the defendant (Art. 195).

The effects of litispendence are (1) that even if another action is brought in another Court in regard to the same subject-

matter, the other party need not respond to such action (plea of litispendence), (2) that without the consent of the defendant, the plaintiff may not change his cause of action, (3) that the Court of the suit is confirmed and fixed once and for all, and (4) that it determines the term within which the defendant may bring a cross action (*hanso*) (Arts. 195 and 200). Litispendence is terminated by (1) the withdrawal of the action, (2) the judgment in the case becoming irrevocable, (3) compromise, (4) waiver, (5) acknowledgment, etc.

Petitions must be drawn up in conformity with certain formalities (Art. 190). When a petition is lacking in the conditions legally required, it does not take the effect of an action; but, in a Local Court, an action may be brought orally as well as in writing (Art. 374). As to preparatory documents or pleadings (Art. 104 *et seq.*), even if the plaintiff fails to present them, it does not constitute a deficiency in the conditions for a petition; but such failure is attended with the undesirable result that a delay is caused in the progress of the suit and the plaintiff must bear the costs of the suit resulting therefrom. The same applies to an answer in writing which the defendant is bound to present upon service of the petition of the plaintiff upon him (Art. 199). The Court fixes a time for hearing, which must be at least twenty days after the service of the petition upon the defendant (Art. 194) and summons the parties. In Japanese law, oral proceedings are not divided into several distinct stages; but the parties may, at any time, during the whole course of the oral proceedings, present any means of attack or of defence (Art. 209), the only exception to this rule being in regard to pleas in abatement, which must (if at all) be advanced within a fixed period (Art. 206). The Court is bound to use every care to facilitate the progress and conclusion of suits, and, in case of need, it may combine two or more suits (Art. 120), divide a suit (Art. 118) or limit the oral proceedings to part of them in case several independent means of attack or of defence have been brought forward (Art. 119).

Pending a suit, the parties have a right to dispose of such suit. Thus, the plaintiff may withdraw the suit or waive his claim, and the defendant may acknowledge the claim of the plaintiff; while the parties may settle the dispute by compromise.

The withdrawal of a suit must not be confounded with the waiver of the claim involved, for the former merely means the waiver on the part of the plaintiff of the right to obtain judgment for which he has brought the action, while the latter means the waiver of a material right itself. Nor should acknowledgment by the defendant be confounded with a confession in Court (*saibanjō no jihaku*). A confession is nothing more than an expression of intention declaring the allegation of the adversary as to facts to be true, but acknowledgment means entirely to admit the claim advanced by the adversary.

When the defendant disputes the claim of the plaintiff, the Court must institute examination into the matter. In such a case, each party may present various means of proof in support of his allegations, and the Court gathers evidence out of such proof. The means of proof which are legally recognized are (1) the testimony of witnesses, (2) expert evidence, (3) evidence by inspection, (4) documentary evidence and (5) examination of the parties in person.

The Court renders judgment after taking into mature consideration the applications of the parties, the means of attack and of defence furnished by them, and, more especially, the result of its examination of evidence. Judgments (*saiban*) are of three kinds, namely, (1) decisions, (2) rulings and (3) orders. A decision (*hanketsu*) is an expression of intention by which the Court declares, on the basis of the oral proceedings, the admissibility or inadmissibility of the contentions under the substantive and adjective laws. A ruling (*kettei*) is a declaration of the Court other than a decision. An order (*meirei*) is a declaration of a presiding judge or a commissioned judge or a requisitioned judge in regard to the conduct of a suit. A decision which is rendered in regard to the whole or a part of

the claim, and which terminates the case wholly or in so far as the part adjudicated upon is concerned, is a final decision (*shūkyoku-hanketsu*), while a decision which is rendered upon a point in dispute as a preliminary to a final judgment is called an interlocutory decision (*chūkan-hanketsu*).

When either party does not appear at the time fixed for hearing, a judgment is rendered in default on the application of the adversary who has appeared (Art. 246 *et seq.*). Against a judgment by default, however, a protest may be entered upon certain conditions (Art. 255 *et seq.*).

(2) *Procedure in Appeal Instance.*

A party who is dissatisfied with a judgment rendered by a Court of first instance has an absolute right of appeal to a superior Court. A system of appeal is recognized partly in the interest of the parties and partly for the purpose of ensuring uniformity in judgments; but appeal can be made only up to third instance (except in case of complaint, which is a kind of appeal, as will be explained later on), as it would be idle to permit appeals from judgment *ad infinitum*.

One point which should be specially mentioned in this connection is that, in the case of civil action, appeal is never made by the State, inasmuch as such an action is attended to for the protection of private rights, and so long as the parties themselves are satisfied, it is not the business of the State to prolong the dispute.

Appeals (*jōso*) are classified into (1) appeals in first instance (*kōso*), (2) appeals in second instance (*jōkoku*) and (3) complaints (*kōkoku*). Appeal in first instance and appeal in second instance are both methods by which dissatisfaction is expressed in regard to a final decision, while complaint is appeal against a ruling or order, which can be made only in certain specified cases.

1. *Appeal in first instance (kōso).*—This appeal is made by one of the parties who is dissatisfied, in point of law and/or in

point of fact, with a judgment in first instance which has not yet become irrevocable, by lodging a notice of appeal to the Court of appeal within a peremptory term of one month from the service of the judgment attacked (Arts. 400 and 401). When an appeal is lodged, it has (1) the effect of transferring the case from one instance to another and (2) the effect of preventing the judgment in first instance from becoming irrevocable.

It is not the function of the Court of appeal to criticize the propriety or impropriety of the judgment rendered in first instance, but it is required to try the case anew. The parties may therefore freely advance means of attack or of defence which have not been advanced in first instance, and make statements which have not been made or even those which they have positively refused to make. But the action being the same in both instances, proceedings taken in first instance do not entirely lose their effect in second instance; and, moreover, the proceedings and decision in second instance are limited to that part of the first judgment as to which dissatisfaction has been expressed (Arts. 411-418).

A point which is worthy of special notice here is that a Court of appeal cannot alter the first judgment to the disadvantage of the appellant (Art. 425), as, otherwise, appeal would be a very risky undertaking to venture upon, and the arrangement which really has been made for the protection of the parties might only have the result of frightening them from having recourse to it.

Appeal in second instance (jōkoku).—An appeal in second instance is made by a party contending that the decision in second instance is in violation of the law, by lodging a notice of appeal to the Supreme Court within a term of one month from the service of the judgment attacked (Arts. 434-438). Like appeal in first instance, appeal in second instance has also the effect of transferring the case from one instance to another and also of preventing the judgment attacked from becoming irrevocable; but the Court of third instance confines itself to the

points of law in dispute, while, as to facts, it bases its judgment on those facts upon which the decision in second instance has been based (Art. 446).

As a consequence of the Court of appeal in second instance (that is, the Court of third instance) not concerning itself with the examination of the facts, if the appeal in second instance is found to be well grounded, the judgment attacked is annulled and the case is either referred back to the Court of second instance or referred to another Court of equal rank (Art. 448); but in case the examination of facts is no longer needed, the Court of third instance (that is, the Supreme Court) at once renders judgment in the place of the judgment attacked (Art. 451).

To the procedure in third instance, the provisions relating to the procedure in first instance before the District Court, and part of the provisions relating to the procedure before the Court of Appeal, apply *mutatis mutandis* (Arts. 444 and 454).

3. *Complaint (kōkoku).*—Complaint may be made against a judgment rendered without preliminary oral proceedings and by which a motion relating to procedure has been dismissed, or against certain other judgments specified in the law (Art. 455).

Complaint comes under the jurisdiction of a Court next superior in order of instance to that Court by which the judgment attacked has been rendered; and it is made by lodging a notice of complaint with the Court by which the judgment attacked was rendered, or to which the presiding judge by whom the said judgment was rendered belongs (Arts. 456 and 457). But in case of urgency, complaint may be made at once to the Court of Complaint (Art. 461). In some cases, complaint may also be raised by a person other than the parties to the action.

Complaint has the effect of transferring the matter from one instance to another; but as a rule it has not the effect of staying the carrying out of the judgment attacked (Art. 460). When the Court, or the presiding-judge, whose judgment is attacked,

finds the complaint to be well founded, it or he may rectify the points complained of (Art. 459).

If there is a further ground of complaint in a judgment rendered by the Court of complaint, another complaint may be made to a superior Court and so on until there is no other superior Court. There is no fixed term for ordinary complaint; but what is called "immediate complaint" (*sokuji kōkoku*) must be made, if at all, within a peremptory term of seven days either from the service of the judgment or from the pronouncement of the judgment (as the case may be) (Art. 466).

3. *Renewal of Procedure (saishin).*

A decision becomes irrevocable as soon as the term for appeal expires without any appeal having been made. But seeing that it would be hard upon the person really entitled to the right in dispute to leave him without any remedy, because judgment has become irrevocable, even when there is a serious objection to the said judgment either in point of law or in point of fact, arrangements are made, by which, in certain specified cases, a party is enabled to apply for the opening of fresh proceedings and the passing of a fresh decision even after judgment has become irrevocable. This is what is called "renewal of procedure" (*saishin*).

Renewal of procedure is obtained either by an action for revivor (*genjō-kwaifuku no so*) or by an action for nullity (*torikeshi no so*). An action for nullity is brought against a judgment which had something illegal about its proceedings (Art. 468); while an action for revivor is brought against a judgment, where there was something unlawful about the material facts on which it was based (Art. 469).

An action for renewal of procedure belongs exclusively to the jurisdiction of the Court by which the judgment attacked was rendered (Art. 472). This is one of the points in respect to which an action for renewal of procedure differs from an appeal.

An action for renewal of procedure is also brought by lodging a petition with the competent Court (Art. 475).

By renewal of procedure, however, the whole case is not tried anew ; but in the same way as in appeal instance, the Court confines itself to the examination of that part of the action in regard to which the previous judgment is attacked. Renewed procedure is to be conducted in accordance with the provisions governing the procedure in the Court before which the action is brought (Art. 473).

SUB-SECTION 2.

SPECIAL PROCEDURE.

(1) *Summary Procedure.*

"Summary procedure" (*tokusoku tetsuzuki*) is a procedure by which a creditor claiming the payment of a fixed sum of money or the rendering of a fixed quantity of other fungibles or negotiable instruments is enabled to procure the execution of his obligation (claim) more simply than in the way of ordinary procedure. In the case of an obligation of this nature, there is usually no dispute between the parties on the head of the relation of right involved ; and so it would mean a mere waste of time and money to no good purpose to insist on the claimant's going through ordinary procedure. In such a case, therefore, the creditor is enabled to apply, by a simpler process, for the issue of a conditional order for payment against the debtor.

An order for payment (*shiharai-meirei*) is an order to the debtor to satisfy the creditor as to his claim and the costs, or raise objection to such order within a specified term, if he does not recognize such claim (Art. 386).

A motion for the issue of an order for payment may be brought either in writing or orally. The procedure comes under the exclusive jurisdiction of the Local Court in which the general forum would be established for the given action if brought in the way of ordinary procedure, no regard being paid to the question of material jurisdiction (Art. 383).

If no objection is raised to an order for payment, the Court, upon the expiration of the term specified therein, and on the motion of the creditor, declares the order to be provisionally executory (Art. 393). Such order for provisional execution is treated in the same light as a judgment by default which has been declared to be provisionally executory, and so protest may be entered against such order in accordance with the provisions governing judgments by default (Art. 394).

(2). *Suits on Documents and Suits on Bills of Exchange or Promissory Notes.*

If in regard to a claim, which has for its subject the payment of a fixed sum of money or the rendering of a fixed quantity of other fungibles or negotiable instruments, the creditor is in possession of documents by which he can prove all facts necessary for establishing such claim, it may, in most cases, be safely presumed that the claimant is indeed the person entitled, and in such a case, therefore, it is essential for the protection of private rights to facilitate the exercise of his right by enabling the plaintiff to assert his claim by a simpler process and settling the cause more promptly than usual. Suits on documents (*shōshō*) and suits on bills of exchange or promissory notes (*kawase sōshō*) are arrangements founded on this consideration.

With this object in view, the means of proof in the case of such suits are limited to documents only—that is, both the plaintiff and the defendant are allowed to assert or deny the existence of the alleged right only by means of documents (Art. 484).

The petition in such a suit must contain a declaration that the suit is brought in the way of a suit upon documents and must be accompanied by the documents either in original or in copy (Art. 485).

SECTION 4.

EXECUTION.

"Execution" (*kyōsei-shikkō*) includes all legally prescribed

acts by which, upon application of the party entitled, the State enforces private rights by means of public force.

SUB-SECTION I.

ORGANS FOR EXECUTION.

Matters relating to execution fall, as a rule, under the jurisdiction of the Local Court having jurisdiction over the place where an act of execution is to be done, such act of execution being effected by a bailiff. Bailiffs (*shittatsuri*) are officers attached to a Local Court, whose duty it is to serve documents and carry judgments into execution. When a creditor delivers an exemplification (*seilion*) of an executable instrument to a bailiff and instructs him to execute the same, such officer is both bound, and entitled, to effect the desired execution. (Art. 543 *et seq.* and Art. 533 *et seq.*)

SUB-SECTION 2.

CONDITIONS OF EXECUTION.

The conditions for execution are of two classes, namely, (1) material and (2) formal.

I. *Material condition (title of obligation).*—In order to effect execution, it is first of all necessary that there should exist a title of obligation (*saimu meigi*) which warrants such a course. A title of obligation is the fundamental condition for execution; and the document must specify the class, the limits, and the date of performance of the obligation in regard to which execution is to be made. Titles of obligation are (*inter alia*):

- (1) Final judgments which have become final and conclusive (Art. 497);
- (2) Final judgments which have not become final and conclusive but which have been declared to be provisionally executory (do.);
- (3) Judgments of execution granted *re* judgments of foreign Courts (Art. 514);

- (4) Judgments of execution pronounced *re* arbitration awards (Art. 802);
- (5) Judgments which can only be attacked by complaint (*kōkoku*) (Art. 559);
- (6) Executory orders—that is, orders for payment which are issued by the Local Court in accordance with the provisions governing summary procedure (do.);
- (7) Compromises concluded, after actions have been instituted, before the Court of the suit or a Commissioned or a Requisitioned Judge (do.);
- (8) Compromises concluded before the competent Local Court without bringing any action (do.);
- (9) Documents drawn up by notaries within the limits of their authority and in the prescribed form; provided that they relate to claims having for their object the payment of a fixed sum, or the rendering of a fixed quantity of other fungibles or documentary securities, and contain a clause to the effect that they are immediately executory.

II. Formal condition (execution clause).—In order to effect execution, it is further necessary to obtain the grant of an “execution clause” (*shikkōbun*)—an instrument which proves the fact of the existence of an obligatory title, and which is drawn up (in case the title of obligation is founded on a judgment) by a Court Clerk and affixed at the end of an exemplification of the judgment, or (in case the title is founded on a notarial deed) by a notary (Art. 516 *et seq.* and also 559).

SUB-SECTION 3.

CARRYING-OUT OF EXECUTION.

When these conditions—material and formal—are fulfilled, things are ripe for execution. As we have already seen, execution is carried out by bailiffs, and the Code contains minute provisions in regard to the manner in which it is to be effected.

1. Seizure, auction sale and delivery.—If the debtor is possessed of sufficient cash, when enforcing a monetary claim, it is seized and delivered to the creditor ; but if he has no money in hand, a sufficient quantity of movables or immovables are seized and sold at public auction, the proceeds being delivered to the creditor. Seizure may be effected even in regard to obligations which exist in favour of the debtor. Execution, however, may not take place if no surplus can be expected, the costs of execution being deducted from the sum to be realized by the objects to be seized. Nor may the following things be seized :—

1. Wearing apparel, bedding, and household and kitchen utensils, in so far as such objects are indispensable to the debtor and his family ;
2. Victuals and fuel necessary for the space of one month for the debtor and his family ;
3. In the case of artists, artisans and workmen, as well as in that of midwives, the objects indispensable for the exercise of their calling ;
4. In the case of agriculturists, the implements, cattle, and manure indispensable for carrying on their husbandry, as well as the agricultural produce indispensable for carrying on their husbandry until the next harvest ;
5. In the case of civil, military, and naval officials, officials of Shintō shrines, Buddhist priests, teachers in public or private educational institutions, advocates, notaries, and doctors, the objects indispensable for the exercise of their calling and also adequate wearing apparel ;
6. In the case of civil, military, and naval officials, officials of Shintō shrines, Buddhist priests, teachers in public or private educational institutions, the portion in money of the income derived from their employment or of their pension, which is legally included among the rights of claim not liable to seizure (see below), such portion being calculated according

- to the number of days between the seizure and the next pay day of the salary or pension ;
7. In the case of an apothecary, utensils, vessels, and drugs indispensable for the preparation of medicines ;
 8. Orders and decorations ;
 9. Legal seals and other stamps necessary for carrying on a business ;
 10. Images and other objects used for the purpose of household worship ;
 11. Genealogical papers ;
 12. Objects relating to inventions of the debtor or of a member of his family which have not been made public, or manuscripts of unpublished works of the debtor or of a member of his family ;
 13. Books intended for the use of the debtor or of a member of his family at school or college.

With the consent of the debtor, however, even the above objects, with the exception of those mentioned under Nos. 3 to 8, may be seized.

The following rights of claim are likewise exempt from seizure :—

1. Legal aliment (support) ;
2. Periodical income derived by the debtor from charitable foundations or by virtue of the liberality of a third person, in so far as the same is necessary for the maintenance of himself and the members of his family ;
3. The pay and pension of non-commissioned officers and of soldiers and sailors, and the monies granted by Government for the support of their relatives surviving them ;
4. The income derived from their employment by persons in the Army or Navy belonging to a mobilized body of troops or to the crew of a vessel of war in commission ;

5. The income derived from their employment and the pension of civil, military and naval officials, of officials of Shintō shrines, of Buddhist priests, and of teachers in public or private educational institutions, and monies granted by Government, etc. for the support of their relatives surviving them;
6. The remuneration for the work and services of artisans, workmen, and servants.

If, however, in the cases contemplated in Nos. 1, 5 and 6, the income derived from employment, the pension, or the other receipts, exceed the sum of three hundred *yen* for the year, one half of the surplus amount may be attached.

If specific goods are the subject of a claim to be enforced, they are likewise seized and delivered to the creditor, should they be found in the hands of the debtor. (Art. 564 *et seq.*)

2. Compulsory administration.—Another form of execution in regard to immovables is compulsory administration (*kyōsei-kwanri*), the object of which is to enable the creditor to obtain performance out of the income arising from the immovables so managed. Art. 640 provides that execution against immovables is effected by way of (1) compulsory sale by auction and (2) compulsory administration, it being at the option of the creditor to have either of these measures taken or to have both of them carried out concurrently. When the Court orders compulsory administration to be made, it appoints an administrator, who has a right to enter into possession of the immovables and collect, in the place of the debtor, prestations made by third persons in regard to the property. The chief duty of such an administrator is to pay the income to the creditor after deducting therefrom taxes and other public imposts and expenses of management, the ownership of the immovables continuing to vest in the debtor all the while as a matter of course (Arts. 706-716).

SUB-SECTION 4.

MEANS OF INSURING EXECUTION (PROVISIONAL SEIZURE
AND PROVISIONAL DISPOSITION).

Rights are established by means of actions and they are enforced by execution. There are, however, cases where it would be extremely difficult, if not absolutely impossible, to carry out execution if things were allowed to slide until ordinary process had been completed in due course—as—e. g.—in the case of a claim against a foreign ship on the point of setting sail and leaving Japanese waters. In such a case, a creditor is, on certain conditions, enabled to apply for the provisional seizure (*kari-sashiosae*) of the particular property of the debtor in regard to which it is necessary for the creditor to have immediate measures adopted. Provisional seizure can be applied for only in respect to a monetary claim or a claim which can be converted into a monetary claim. Being a preventative measure in its nature, provisional seizure can be effected even in respect of a claim the performance of which is not yet due, provided always that there be a good ground. In order to effect regular execution, however, it is of course necessary that an action instituted for the enforcement of the main claim should be brought to a successful termination. Should no such action be pending at the time, and none be brought after provisional seizure has been effected, the Court of provisional seizure may, on the application of the debtor, order the creditor to bring an action within a reasonable term to be fixed by that Court. (Art. 737 *et seq.*)

Provisional disposition (*kari-shobun*) is a measure by which the claimant is provisionally placed in the position of the person entitled, in order to insure the enforcement of the right in dispute, when it is apprehended that the enforcement of the said right may be rendered impossible, or extremely difficult, by a possible change in the situation, as—e. g.—when a person who claims to be entitled to parental power over a certain child is

enabled to obtain delivery of the child temporarily, or to stop another person proceeding on a journey with the child and so anticipate the danger of its being kidnapped and carried out of the country. An application for an order for provisional disposition comes under the jurisdiction of the Court having jurisdiction over the main case, and the procedure involved therein is governed (in the main) by the provisions governing provisional seizure. The Court selects and determines, in the exercise of its discretion, what dispositions are requisite in view of the circumstances of the case. A disposition may take the shape of (1) the appointment of a sequestrator, (2) an order to do, or refrain from doing, a certain act, (3) an order for prestation, or (4) a prohibition to alienate or mortgage certain immovables. (Art. 755 *et seq.*)

Both provisional seizure and provisional disposition have merely the effect of placing the claimant in a certain conditional position which protects him against some possible danger or mishap; and neither of them establishes him in any right. Rights can only be established in accordance with regular judicial process. Hence the word "provisional" (*kari*) by which these measures are qualified.

SECTION 5.

PUBLIC SUMMONS PROCEDURE.

"Public summons procedure" (*kōji-saikoku-tetsuzinki*) is a sort of special procedure of which the chief features are (1) the issue of public summons and (2) the rendering of judgment of exclusion. Resort can be had to this procedure only in the cases specified in the law; and its utility consists in enabling a person to extinguish, within a definite period, the possible claim(s) or right(s) of some unknown party or parties in regard to instruments, etc., as—e. g.—in the case of a bill of exchange or promissory note which has been lost or stolen.

Public summons (*kōji-saikoku*) is judicial notice directed to

some unknown party or parties to declare his or their claim(s) or right(s) against a certain person, etc. to the Court within a fixed period under pain of losing such claim(s) or right(s). Public summons procedure comes under the jurisdiction of the Local Court having jurisdiction over the place of performance specified in the instrument. An application for public summons may be made either orally or in writing. Public summons must contain :—

1. Designation of the applicant ;
2. Summons to declare claims or rights by a fixed hearing time (between which and the day on which the summons is inserted in the Official Gazette or the Public Advertiser, a period of at least two months must, as a rule, lie) ;
3. Warning that the claims or rights will be forfeited if they be not declared ;
4. Designation of a hearing time.

Public notices relative to public summons are made by publishing them on the notice-board of the competent Court and inserting them in the Official Gazette or the Public Advertiser. At the hearing time when proceedings are held in regard to an application for judgment of exclusion (which may then be made by the applicant for public summons), a person who intends to assert a right may appear and make a statement, even though he has not previously declared the same. If neither party appears at the hearing time, the procedure stands still ; and if the applicant does not appear notwithstanding that some other party or parties have appeared, no judgment by default can be rendered because no application for judgment of exclusion has yet been made. In either of these cases, the Court fixes a new hearing time on the application of the applicant (for public summons), provided that such application be made within six months from the original hearing time.

If no declaration of rights be made not only within the term specified in the summons but subsequent thereto but

previous to the rendering of a judgment of exclusion, the Court renders a judgment of exclusion (*joken hanketsu*) on application and confirms the relation of right once for all. A judgment of exclusion declares the instrument to be invalid (in case the public summons concerns an instrument), but the applicant is entitled, as regards the person(s) bound under the instrument, to the rights specified therein (in his favour). No recourse is permitted against a judgment of exclusion; but in the following cases it may be attacked by an action brought against the applicant in the District Court having jurisdiction over the place of the Court of the summons:—

1. If the case was not one legally admitting of public summons procedure;
2. If no public notice of the summons has been made or the public notices have not been made in a manner required by the law;
3. If the term of public summons has not been observed;
4. If the adjudicating judge was excluded by operation of law from exercising judicial functions;
5. If, notwithstanding that a claim or right has been declared, such declaration has not been duly considered;
6. If conditions exist which would justify an action for revivor on the ground of the Judge having participated in the proceedings notwithstanding his having committed a criminal offence in violation of his official duties in connection with the action, etc. (Art. 764 *et seq.*)

SECTION 6.

ARBITRATION.

“Arbitration procedure” (*chūsai-tetsuzuki*) is a process by which a dispute in regard to a property right is referred, by the mutual agreement of the contending parties, to the decision

of a third person or third persons (arbitrators : *chūsai-nin*). Though the decision or award (*chūsai handan*) rendered by the arbitrator(s) is not necessarily an application of the law, it has yet the same effect as a final and conclusive judgment of a Court.

Disputes which can be referred to arbitration are limited to matters (1) which come under the jurisdiction of civil courts (and so criminal cases admit of no arbitration) and (2) regarding which the parties are permitted to conclude compromises (and so disputes relating to rights such as those under the family law cannot be settled by arbitration). On the fulfilment of these conditions, a dispute can be referred to arbitration not only when it is actually pending but also when it is apprehended that it may arise in future. An agreement to refer a future controversy to arbitration, however, has no effect unless it relates to a determinate relation of right or to the controversies arising therefrom.

Arbitrators are entitled (1) to examine witnesses and expert witnesses who appear voluntarily, and (2) to continue the procedure and render an award even where either party asserts that the case does not legally admit of arbitration procedure, that no valid agreement to refer exists, that the agreement to refer which does exist does not relate to the controversy to be decided, or that they (the arbitrators) have no power to exercise their functions as such. Arbitrators may also be refused for causes similar to those for which a judge may be refused and also for certain other causes.

Unless otherwise provided, an award is to be decided upon by a majority vote in case there are several arbitrators. An award must contain the date of making and be signed and sealed by the arbitrators ; and an exemplification thereof, also signed and sealed by the arbitrators, is to be served on each of the parties ; while the original is required to be deposited at the Clerks' Office of the competent Court with the documents of service annexed.

An award duly rendered by arbitrators has the same effect

as a final and conclusive judgment of a Court, and settles the relation in dispute once and for all so far as the parties are concerned; but it can be enforced by execution only when backed up by a judgment of execution. No judgment of execution can be rendered if there exists a ground on which application can be made for the annulment of the award. An action for the annulment of an award can be brought only for certain specified reasons, such action, as also an action for the appointment or refusal of arbitrators, an action for judgment of execution and so on, coming under the Local or District Court designated in the agreement to refer, or, in the absence of any such designation, the Local or District Court which would be competent if the claim were judicially asserted in a Court instead of being referred to arbitration.

As to whether the Court may dismiss the case if either party brings an action in a Court after an agreement to refer has been entered into in regard to a particular relation of right, this question has been answered in the affirmative by the Japanese Supreme Court. (Art. 786 et seq.)

CHAPTER 9.

THE CODE OF CRIMINAL PROCEDURE

(*Keiji Soshō Hō*).

The *Code of Criminal Procedure* is a formal public law containing provisions with which the Judges, Public Procurators, persons accused, etc. must comply in regard to any dispute about the application of law, when the State enforces, or tries to enforce, its penal power against offenders—real or alleged—under the *Criminal Code*. As the *Code of Civil Procedure* is an adjective law to the *Civil Code*, so the *Code of Criminal Procedure* is an adjective law to the *Criminal Code*. This is

why, in the *Law of the Constitution of the Courts of Justice*, the constitution of the Civil Courts are provided side by side with those of the Criminal Courts. The chief points on which the *Code of Criminal Procedure* differs from the *Code of Civil Procedure* is, that actions in the former have for their object the enforcement, under public law, of the penal power of the State, and the parties to them therefore, as a rule, are not permitted to alter the rights and duties involved ; while actions in the latter have for their object the claiming of redress under private law against encroachers upon private rights, and the parties are, therefore, as a rule, permitted to modify their rights and duties. One, in short, is a compulsory law, while the other is an optional law.

Owing to this difference in the object with which actions are brought notwithstanding that the two codes of procedure are of the same legal nature, there are many differences in their provisions as to the commencement, progress and termination of actions, the principal of which we will briefly explain in due sequence.

SECTION I.

JURISDICTION OF THE CRIMINAL COURTS.

Like the jurisdiction of Civil Courts, the jurisdiction of the Criminal Courts may also be generally classified into (1) material jurisdiction and (2) territorial jurisdiction. Material jurisdiction is the competency of the Courts which is determined by the classes of offences, the degree of gravity of penalties to be imposed, the social status of offenders, the object of offences, etc., while territorial jurisdiction is the competency of the Courts which is determined by the territorial limits of the districts within which they exercise jurisdiction. When there is a conflict in point of material jurisdiction—as when an action is to be brought against the same individual relative to several offences over which several Courts have jurisdiction—the highest of all the Courts concerned is to adjudicate on all the offences together.

When, again, there is a conflict in point of territorial jurisdiction—as when several Courts have jurisdiction over one and the same criminal case—the one among them that first commenced preliminary examination or public trial is competent. (Arts. 25, 27 and 28.)

SECTION 2.

EXCLUSION, REFUSAL AND EXCUSE OF OFFICERS OF THE COURTS.

Like the *Code of Civil Procedure*, the Code also contains provisions according to which a judge or a court clerk is excluded by operation of law from exercising his functions as such or may be refused. When a judge (or a court clerk) is in a certain relation with regard to the case in hand—as, for example, when he himself is the injured party, when he or his wife is related by blood or marriage to the accused, to the injured party or to the wife or husband of such person, etc., etc.—such judge (or court clerk) is, by operation of law, excluded from the exercise of his functions. A judge (or a court clerk) may be refused either by the Public Procurator or any other person interested on the same grounds as those on which a civil judge may be refused.

When a judge (or a court clerk) himself recognizes that there exists a cause for exclusion, or that his participation in the case would be prejudicial to impartiality of judgment, he may excuse (*kwaihi*) himself from the exercise of his functions by declaring the fact to the Court competent to decide a motion for refusal. (Arts. 40-45.)

SECTION 3.

INQUIRY INTO OFFENCES.

When a Public Procurator obtains knowledge of an offence having been committed, by complaint, by accusation, by flagrancy or by any other cause, or considers that an offence

has been committed; before he proceeds to bring public action it is necessary for him to inquire as to whether there are facts sufficient to warrant such a course—that is to say, whether the person suspected is really the offender, whether the act constitutes an offence, whether it constitutes a case coming under the competency of an ordinary Court, etc. The Code, therefore, invests Public Procurators with power freely to make inquiry into these matters (that is, power of inquiry and investigation). The Chief of the Metropolitan Police Board and prefectural governors are, as officers of judicial police (*shihō-keisatsukwan*), each within his own district, possessed of the same power as the Public Procurator of the District Court in regard to criminal inquiry and investigation. (1) Chief inspectors of police, inspectors and assistant inspectors, (2) officers and non-commissioned officers of gendarmerie, (3) governors of islands, (4) headmen of districts (*gunchō*), (5) fore-try officers, (6) mayors of cities and headmen of towns and villages and (7) shipmasters may exercise power of criminal inquiry and investigation as assistants to Public Procurators. (Arts. 46-48.)

SU-P-SECTION 1.

Complaint and Accusation.

Complaint (*kokuso*) is information against an offender which is given by the injured party himself to the Public Procurator or the officer of judicial police at the place where the offence was committed or where the offender resides; while accusation (*kokuhatsu*) is information which a person (other than the injured party) gives, as regards the facts (real or supposed) of an offence which he knows or considers to have been committed, to the Public Procurator or the officer of judicial police at the place where the offence was committed or where the offender resides. Both complaint and accusation are (as a rule) to be made in writing signed and sealed by the complainant or accuser and accompanied by proofs. They may also be made

verbally, in which case the officer who receives such communication must draw up a protocol in writing and have it signed and sealed by the complainant or the accuser (as the case may be). In case complaint or accusation has been made *in bad faith*, the complainant or accuser is liable to punishment for false accusation, if, the person against whom such complaint or accusation has been made, having been either acquitted or found not guilty, brings an action for false accusation against him. Even when complaint or accusation has been made in good faith, the complainant or accuser cannot evade civil responsibility for damages if he has been in grave error. (Arts. 13, 14 and 49-55.)

SUB-SECTION 2.

FLAGRANT OFFENCES AND QUASI-FLAGRANT OFFENCES.

A flagrant offence (*genkō-han*) is one which is discovered at the moment of committal or immediately after (Art. 56); while a quasi-flagrant offence (*jūn-genkōhan*) is (1) where an individual is pursued as offender by the cries of one or more persons, (2) where an individual is found possessed of dangerous weapons, stolen goods, etc., or bears upon his person or dress clear traces from which it may be presumed that he is the offender, or (3) where the head of a house requires the assistance of an official in order to inspect the proofs of an offence committed in that house or in order to arrest the supposed offender (Art. 57).

Provisions relative to flagrant offences have been specially inserted in the Code in order to provide against the escape of the offender or the destruction of proofs for want of adopting prompt measures. So, an officer of judicial police, police constable, gendarme, or any other person may, without waiting for a warrant, arrest the offender (real or supposed) in any of such cases (Art. 58 and 60).

SUB-SECTION 3.

CRIMINAL PROSECUTION.

When inquiry in a criminal case has been completed and it is found that there are sufficient proofs of the fact of an offence having been committed, the matter is referred to an examining judge (*juge d' instruction*: *yoshin hanji*) for preliminary examination, or (in certain cases) at once to the Court of public trial. This procedure is known as prosecution (*kiso*). In Japan, whether a prosecution shall be instituted or not is left to the discretion of the Public Procurator; the principle acted on is that in case he is satisfied that an offence has been committed the Public Procurator is always bound to commence prosecution without any regard to his personal views as to the expediency or 'inexpediency of such a course and to the circumstances of the case, however extenuating they may be. (Arts. 62-66, 212, 235 and 236.) It may be added, however, that a case may be quashed by direct order of the Minister of Justice if he likes to interfere.

SECTION 4.

PRELIMINARY EXAMINATION.

Preliminary examination (*yoshin*) is part of the inquiry into the facts of an offence which is inaugurated by the institution of public action; it is a three-phased proceeding in which (1) the prosecutor (the Public Procurator), (2) the accused and (3) the Court take part. Preliminary examination has for its object to make preparatory examination in so far as is necessary for determining whether the case should be referred to public trial or the accused be acquitted and the proceedings against him terminated. In order to attain this object in view, the examining Judge may do almost all acts of inquiry, searching for and seizing articles, arresting and detaining the accused, examining witnesses and expert witnesses and the accused,

availing himself of documentary evidence, making inspection on the spot, etc., In regard to these inquiries, the Code acts on the principle of "free conviction," that is to say, whether the accused be found guilty or not is to be determined by the examining Judge according to his conviction on the basis of the facts gathered from all directions (Art. 90). But the examining Judge is not allowed to act on the said principle of "free conviction" to such inordinate length as to outstrip the bounds as specified by the Public Procurator as regards the accused and his alleged criminal act. This is the result naturally following from the fact that in Japanese law, the principle of impeachment (*dangai*)—that is, the principle according to which judgment can only be passed in regard to an action brought by the prosecutor—is acted on instead of the principle of inquisition (*kyūmon*)—that is, the principle according to which the judge is permitted freely to make criminal inquiry of his own motion and without any action being brought before him (Arts. 67 and 184).

SUB-SECTION I.

WARRANTS OF SUMMONS, WARRANTS OF PRODUCTION AND WARRANTS OF DETENTION.

A warrant of summons (*shōkanjō*) is a warrant which the examining Judge, when he entertains a case at the instance of the Public Procurator, issues against the accused requiring him to appear in Court. A warrant of production (*kōinjō*) is a warrant which is issued in order to have the accused taken to Court (1) when the accused does not appear at the appointed time, in spite of a summons having been served on him, (2) when he has no fixed residence, (3) when fears are entertained that he may take flight or may destroy proofs against him, or (4) when, the accused having been guilty of a non-consummated offence or made a threat, it is feared that he may try to consummate the offence or carry his threat into execution. A warrant of

detention (*kōryūjō*) is a warrant which is issued in order to detain the accused in Court (1) when on examination it is found that he has committed an offence punishable by imprisonment or a heavier penalty, or (2) when the accused has taken flight. (Arts. 69, 71, 72.) Every warrant must state the charge against, and the name, profession and residence of, the person against whom it is issued, and the date of issue, and must be signed and sealed by the Judge and Court Clerk, a summons being served by a bailiff on the accused, while a warrant of production and a warrant of detention are carried into execution by a constable or gendarme (Art. 76):

SUB-SECTION 2.

EXAMINATION OF THE ACCUSED.

Examination of the accused is a method of taking evidence and has for its object to cause the accused freely to make statements favourable or unfavourable to himself in regard to the charge brought against him, so that the examining Judge may form a definite conviction in favour of or against the accused. In former days when actions were conducted on the principle of inquisition, the confession (of guilt) of the accused was considered as having the effect of nullifying all other evidence; but nothing can be more absurd than such a practice. From a technical point of view, statements unfavourable (that is, a confession of guilt) and statements favourable to the same are alike statements of the accused; and if the accused was to be found guilty on the basis merely of his confession, it would be productive of lamentable results—nay, under such a system, there would be no call for a law of procedure. It is for this reason that the Code provides first in Art. 94 that the examining Judge shall not, in order to obtain a confession of guilt from the accused, use menaces or false allegations and further in Art. 198 that after the investigation of each piece of evidence, the

Presiding Judge shall ask the accused whether he has any opinion to offer thereon and further tell him that he may produce any evidence that may tend to benefit him—provisions which expressly declare that statements of the accused which are favourable to himself are also of value under the law of procedure (Arts. 93-101 and 198).

SUB-SECTION 3.

EXAMINATION OF WITNESSES.

In order to ascertain the facts of an offence, the Court may summon for examination persons other than the accused who have, or are supposed to have, been witnesses of the facts in question. Such persons are called witnesses (*shō-nin*). Persons other than the accused who are summoned as witnesses must, unless prevented from so doing by sickness or some other legitimate hindrance, appear at the appointed place at the appointed time and "speak the truth conscientiously, concealing nothing and adding nothing whatever"—as the words in which they are first required to swear go, a witness who fails to perform this legal duty being liable to a fine or detention. But (1) the civil prosecutor, (2) relations by blood or marriage of the civil prosecutor or the accused, (3) guardian or ward of the civil prosecutor or the accused, (4) servants or employees of, and persons residing in the same house with, the civil prosecutor or the accused, (5) minors under sixteen years of age, (6) persons who do not possess full intellectual faculties, (7) deaf mutes, etc. are disqualified for witnesses. Public officials, or persons who were public officials, may refuse testimony, on proving the circumstance, with regard to facts about which they are or were under official obligation to preserve secrecy; and doctors, apothecaries, midwives, advocates, notaries, priests, etc., with regard to facts which have come to their knowledge in connection with their business and about which they are bound to preserve secrecy. (Arts. 115-134.)

SUB-SECTION 4.

EXPERT WITNESSES.

An expert witness (*kantei-nin*) is a person who, by reason of his special scientific or business knowledge, is summoned to Court and required, under the *Code of Criminal Procedure*, to examine, and give his opinion upon, facts connected with a criminal case, for the examination of which the Court stands in need of the assistance of an expert. The provisions governing the qualification for being expert witnesses, the cases where a person may refuse to give expert evidence, the penalty to which an expert witness is liable, etc. are mainly the same as those relating to witnesses (Arts. 135-141).

SUB-SECTION 5.

INSPECTION, SEARCH AND SEIZURE OF ARTICLES.

Inspection (*kenshō*) is an act of a Judge which is done in order to ascertain by his own personal experience the existence of facts connected with a criminal case, while search (*sōsaku*) is an act done by a Judge for the purpose of discovering either materials which may serve as evidence of the offence or the offender himself (Arts. 102-105). Seizure (*sashiosae*) goes further than either of the two above mentioned, for it means to dispossess, by positive measures, the possessor of articles which are considered as calculated to prove the facts of the offence. But in the case of objects in possession of persons who may refuse testimony, and which concern those facts in regard to which they are bound to preserve secrecy, it is a matter of course that they cannot be seized except with their consent (Arts. 106-114).

SUB-SECTION 6.

LIBERATION ON BAIL AND "Sekifu."

Liberation on bail (*hoshaku*) is where, on the application of the accused who is under detention pending preliminary

examination, or of his legal representative, the examining Judge liberates the same for the time being in consideration of a sum of money which is furnished by the accused or his legal representative by way of security. Liberation on bail, however, does not extinguish the effect of the warrant of detention issued against the accused but simply suspends the execution thereof for the time being, so the accused must appear in Court in answer to a summons, whenever the Court finds his appearance necessary: and should he fail to appear without good reason, not only the security money will be confiscated either wholly or partly but the decree granting temporary liberation will also be annulled.

Sekifu is an arrangement which owes its origin to the Japanese practice in former days of committing the accused to the care and custody of his immediate neighbours or of the authorities of his village. It differs from liberation on bail in that neither application of the accused or his legal representative nor security is required therefor, but the examining Judge, after hearing the opinion of the Public Procurator, entrusts the person of the accused to the care of his relations or friends on requiring the latter to produce a document of guarantee to the effect that they will cause him to appear whenever summoned by the Court. If the accused committed into the custody of his relations or friends should fail to appear without good reason when summoned, the decree of temporary liberation will be annulled. (Arts. 150-160.)

SUB-SECTION 7.

CLOSURE OF PRELIMINARY EXAMINATION.

The closure of preliminary examination is an intermediary step by which it is determined whether the case should be referred from preliminary examination—which is conducted almost on an inquisitorial plan—to public trial—which is conducted on the principle of impeachment pure and simple. According to

Japanese law, if the examining Judge considers that the case does not come within his jurisdiction, or that further examination is unnecessary, he is required to transmit all the records of the case to the Public Procurator, requesting his opinion as to the closure of preliminary examination. Whatever may be the opinion of the Public Procurator, however, the examining Judge must close the proceedings. It is provided for the protection of the accused that if a ruling acquitting the accused has become irrevocable, the Public Procurator can no longer prosecute him for the same act, and that even under another title. But should there be a change in the circumstances of the offence of which he has been accused, that is, if new proofs should transpire against him, he may of course be newly prosecuted on the basis of such proofs. (Arts. 161-175.)

SECTION 5.

PUBLIC TRIAL.

Public trial (*kōhan*) is a proceeding by which the Judge, in regard to a case becoming pending in the Court either in consequence of closure of preliminary examination or of immediate reference, determines whether the State has power to impose a penalty and the extent of such power (if any).

Japanese law acts on the principles of impeachment, public hearing, oral debates and direct investigation. Impeachment is, as already explained, an arrangement under which prosecution is entrusted to one office, and trial and judgment to another. According to the principle of oral debates, the relations involved in an action are orally communicated between the Court and the parties to the action.

Though the *Code of Criminal Procedure*, as the *Code of Civil Procedure* (Art. 103) does, does not expressly provide that it acts on the principle of oral debates, yet that it does so may be gathered from the trend of the whole of its provisions relating to public trial. The *Constitution* (Art. 59) provides that trials and judgments of a Court shall be held and rendered publicly; and

the *Code of Criminal Procedure* also provides that the same principle shall be followed as a rule. The principle of direct investigation is one according to which judges are, as a rule, not to be guided by the protocols embodying the investigation of the examining Judge but by the evidence directly gathered by themselves in Court; but, in practice, the Judges are guided by the protocols. We will now proceed to explain the matter under separate heads: (1) the scope of examination at public trial; (2) the order of examination at public trial and (3) judgment.

SUB-SECTION 1.

SCOPE OF EXAMINATION AT PUBLIC TRIAL.

That the scope of examination at public trial is determined by the scope of the public action is a point which is provided in Art. 184 of the Code, in other words, the Court of public trial can adjudicate only on matters which have been referred by the Public Procurator either directly or through the examining Judge. But in regard to accessory offences which have been discovered in the course of the oral proceedings, they may be adjudicated upon, even though no special prosecution has been instituted for them (Art. 184, par. 2 and Art. 185).

SUB-SECTION 2.

ORDER OF EXAMINATION AT PUBLIC TRIAL.

First of all, the accused is to be interrogated as to his name, age, profession, residence and place of birth; and this is followed up by the statement by the Public Procurator of the case against the accused as based on the ruling closing preliminary examination or the indictment (as the case may be). After this speech of the Public Procurator, the Judge examines the accused as to the criminal act of which he stands accused. It is a rule that the Public Procurator's speech and the examination of the accused should be delivered and conducted where witnesses

are not present (Art. 193). After the examination of the accused, witnesses and expert witnesses are examined, protocols are read aloud, pieces of evidence are shown, and then the debates are opened by the Public Procurator, followed by the accused and his counsel.

SUB-SECTION 3.

JUDGMENT.

Judgment is rendered by reading aloud the formal adjudication (*shubun*) either on the day on which the debates are concluded or on the day set for the next hearing. The reasons for the judgment are sometimes read aloud along with the formal adjudication, but more often they are verbally summarized, the person condemned being enabled to apply for an exemplification or copy of, or an extract from, the judgment. At the same time, the accused is to be informed of the term within which he may appeal. When a penalty is pronounced by judgment by default, it is necessary to declare that protest may be entered against it, together with the term for such protest. In order that the rendering of a judgment may be valid, it is as a rule necessary (1) that the same Judges have attended the public trial throughout without interruption and (2) that the accused is alive. (Arts. 203-207.)

SUB-SECTION 4.

RECOURSE.

Recourse (*jōso*) is a method by which a judgment of a Court (before it becomes final and conclusive) is attacked by any of the parties and other persons concerned who are dissatisfied with it, in order to have it quashed or modified. Recourse may take the shape of (1) appeal in first instance, (2) appeal in second instance or (3) complaint.

(1) *Appeal in First Instance.*

Appeal in first instance (*kōso*) is made against a judgment

in the main case, or against a certain judgment prior to that in the main case (that is, a judgment against an exception taken on the ground of incompetency of the Court or inadmissibility of public action), rendered in first instance by a Local Court or a District Court. Appeal may be made either against the whole of a judgment or against a portion thereof.

The Public Procurator, or any other person concerned, who desires to appeal, must, within five days from the day on which the judgment to be attacked was rendered, present a notice to the Court which has rendered the judgment to be attacked. An appeal which has not been lodged in due time, or which is considered as not well founded, is to be rejected. (Arts. 250-266.)

(2) *Appeal in Second Instance.*

Appeal in second instance (*jōkoku*) is admissible against a judgment in the main case, or against a certain judgment prior to that in the main case (that is, a judgment against an exception taken on the ground of incompetency of the Court or inadmissibility of public action), rendered in second instance by a District Court or an Appeal Court, always on the ground only that the judgment attacked is in violation of law. A judgment is legally considered to be in violation of law, for example, when the Court adjudicating was not constituted as prescribed by law, when a judge took part in the proceedings notwithstanding his being excluded by law from the exercise of his functions, etc., etc.

The Public Procurator, or any other person concerned, who desires to make appeal in second instance, must, within three days from the day on which the judgment attacked was rendered, present a notice of appeal to the Court which has rendered the judgment attacked. An appeal which has not been made in time, or which is deemed unfounded, is of course to be dismissed. (Arts. 267-292.)

(3) *Complaint.*

Complaint (*kōkoku*) may be made only in those cases

where it is expressly permitted by law. It may, for example, be made against (1) a ruling rejecting as unfounded a motion for refusal (Art. 42), (2) a ruling imposing a fine not exceeding 40 *yen* or a police fine upon a witness or an expert witness on the ground of his refusing to be sworn or to testify (Arts. 126, 138 and 190).

The Public Procurator, or any other person concerned, who desires to make complaint, must, within three days from the day on which the judgment attacked was served, lodge a notice of complaint in the Court by which the judgment attacked was rendered. On receipt of the notice, the Court must rectify the points complained of, if it considers the complaint to be well founded, while, if it does not, it must, within three days, transmit to the Court of complaint—that is, the Court next superior in order of instance—the notice of complaint accompanied by the reason for which it considers it as unjustifiable. The Court of complaint then considers whether the complaint is admissible or otherwise and must reject it if it does not fulfil the conditions required for complaint. (Arts. 293-300.)

SUB-SECTION. 5.

FINAL AND CONCLUSIVE JUDGMENT.

When a certain term of days has elapsed after the rendering of a judgment in a criminal case and it has become impossible to attack the same by means of appeal, etc., the judgment has then become final and conclusive. The effect of a judgment having become final and conclusive is that, whether such judgment is correct or otherwise, no fresh trial and judgment can be demanded for the act against the same person. This is what is technically called *res adjudicata* (*ichiji-fusairi*). (Art. 6, No. 3 and Art. 17.)

SUB-SECTION 6.

EXTRAORDINARY APPEAL AND RENEWAL OF PROCEDURE.

In case the accused would be improperly charged with

responsibility because of an error in law or an error in fact in a judgment which has become final and conclusive, remedy is afforded him by extraordinary appeal (*hijō-jōkoku*) in the former case (i.e., in case there is an error in law) and by an action for renewal of procedure in the latter case (i.e., in case there is an error in fact).

An error in law for which extraordinary appeal may be made is where, whether in first or second instance, judgment has been pronounced punishing an act which is not punishable by law, or a heavier penalty has been pronounced than is proper or legitimate (Art. 292). If such an improper judgment has become irrevocable, because no appeal has been lodged in time, the Public Procurator of the Court which is entitled to accept appeal in second instance in such case may, either under the instructions of the Minister of Justice or of his own motion, make an extraordinary appeal at any time. Should the Court accepting such appeal deem it well founded, it must quash the judgment attacked and pronounce judgment in the case forthwith.

Renewal of procedure (*saishin*) is provided for in detail in Arts. 301-309 of the Code. In case an error in fact is discovered in regard to a final and conclusive judgment on a felony or misdemeanor, as (for example) when, although the accused has been condemned for homicide, it is subsequently proved that the person supposed to have been slain is alive or was already dead at the time of the alleged offence, etc., the Public Procurator of the Court which has pronounced the penalty, the Public Procurator of the Court of Appeal having jurisdiction over the Court which has pronounced the penalty, the condemned, etc. may apply for renewal of procedure by filing in the Court which has rendered the judgment attacked a petition accompanied by a copy of the judgment attacked and also documentary proofs.

If the Court to which such appeal is made considers that the appeal is well founded, it is to quash the judgment attacked

and refer the matter to another Court of the same degree as that which has rendered the said judgment.

SECTION 6.

EXECUTION OF PENALTIES.

When a judgment of condemnation has become final and conclusive, the penalty must be inflicted under the instructions of the Public Procurator of the Court which has pronounced the said judgment or the Public Procurator of the Court designated and instructed by the Court of appeal in second instance. To this rule, however, the execution of capital punishment forms an exception. When a condemnation to death has become final and conclusive, the Public Procurator must transmit the records of the case to the Minister of Justice and the penalty can be enforced only after orders for the execution have been received from the Minister. (Arts. 317-320.)

CHAPTER X.

INTERNATIONAL PUBLIC LAW.

SECTION I.

NATURE OF INTERNATIONAL PUBLIC LAW.

International public law (*kokusai-kōhō*) is that law which determines the relations of rights and duties among States. But it differs entirely from domestic or municipal law in the manner in which it is made, etc. None but States can have rights or bear duties under international public law. A State is an organization composed of a fixed territory and people and governed by a sole sovereignty. The components of a State are, thus, (1) sovereignty, (2) territory and (3) people.

There is only one sovereignty to a State; but from different points of view, its action may be classified into (1) the

action within the State and (2) the action towards foreign powers. The State's action at home is of a positive nature, in that it governs by power a land and its people; but its action towards foreign powers is of a negative nature, inasmuch as it is bound to refrain from encroaching upon them. As the sovereignty of one State towards other Powers is actively negative, so the sovereignty of other Powers towards such State is passively negative. Nor does it operate on a footing of inequality, as the action of sovereignty at home does, but on a footing of equality. Territory (*ryōchū*) denotes a fixed area which stands under a fixed sovereignty. Territorial sovereignty, thus, possesses positive and negative effects, that is, the positive effect to govern the territory of the given State, and the negative effect that prevents it from being exercised outside the territorial limits of that State.

The territories of States being limited parts of the surface of the Earth, they must be divided from each other by boundary lines, which may be either natural (as in the case of mountains, rivers, lakes, etc.) or artificial (as in the case of canals). The territory of a State is partly land and partly land covered by water. That part of the territory of a State which is covered by water is:

1. Canals (as the Suez Canal and Panama Canal);
2. Straits;
3. Rivers;
4. Lakes;
5. Seas.

Seas are classified into (1) high seas and (2) territorial seas. The high sea (*kōkai*) is free and common to all countries: it belongs to no particular country. Territorial seas (*ryōkai*) include (1) seas round the coasts and (2) territorial sea in a narrower sense. Seas round the coasts are within three knots from the dry land at the lowest ebb-tide towards the ocean, while territorial sea in a narrower sense denotes the whole part of the sea embraced by gulfs or bays or inland seas, etc., provided that the straight line drawn between both ends of the mouth or entrance thereof is ten knots or less.

The State may acquire territorial sovereignty in two ways, namely, (1) by original acquisition or prior possession, that is, by acquiring land which belongs to no country, and (2) by derivative acquisition, that is, by acquiring land belonging to some other country. This may be effected by exchange, purchase, gift, or cession under a peace treaty, etc. Permanent occupation and lease resemble cession as a matter of fact; but, in legal principle, they are not cession.

A third component element of a State is natural persons who belong to such State by nationality. Nationality (*kokuseki*) denotes a relation of absolute subjection in which certain natural persons stand to the sovereignty of a certain State. How a natural person acquires nationality, and when he comes to enjoy and exercise rights under the law of the State to which he belongs, are matters which are provided for in the domestic law of each country. In Japan, they are provided for in the *Law of Nationality* promulgated in 1899.

SECTION 2.

CLASSES OF STATES.

In view of sovereignty, States may be classified into (1) sovereign States and (2) semi-sovereign States. This distinction is drawn in view of whether States allow other States to subrogate in regard to the exercise of their own sovereignty. A State which gives consent to the exercise of the sovereignty of another, or by which the sovereignty of another is exercised is called a suzerain state (*sōshū koku*). Korea before the annexation was a semi-sovereign State *vis-à-vis* Japan. A permanently neutral State is also subject to restrictions by treaty in regard to the exercise of its sovereignty; but it is subject to the control of no suzerain State: only there are other States which guarantee its permanent neutrality. So, a permanently neutral State is not a semi-sovereign State. The points which characterize a permanently neutral State are (1) that it is created by treaty, (2) that its existence is guaranteed.

by other States, (3) that it is already fixed to be neutral in time of peace, (4) that it cannot positively declare aggressive war, and (5) that war is not declared against it by other States.

In view of their internal organization, States may be classified into (1) simple States and (2) complex States. A simple State is a State which can exercise its sovereignty by itself, that is, without joining hands with another State, such being Japan, Great Britain, Russia, etc. A complex State is one which is composed of two or more States and of which the component States become authors of acts under international law simultaneously with the composite State itself, such having been the case with the German Confederacy of 1815-1866. Monarchically combined States are States which are joined together simply in the person of a sovereign. Such States are each a simple State in international law: they simply happen to have the same sovereign: in all other respects they are entirely separate from each other. An example of monarchically combined States was afforded by the king of the Belgians who was at the same time the King of the Congo before 1908. Politically combined States are two or more States which are combined against foreign powers for certain political purposes, Austria and Hungary being a case in point.

The advantage of distinguishing politically combined States from monarchically combined States lies in the fact that if one of two politically combined States declares war against a third power, the other, too, must fight such third power, while in the case of monarchically combined States, one of them may enter upon war with a third power but it is not necessary for the other to participate in the struggle.

SUB-SECTION 3.

RIGHTS AND DUTIES OF A STATE.

Though a State is independent, yet so long as it is a member of the comity of nations, it must be considered as being independent only in so far as compatible with the rights of other

States. In point of form, a State has equal rights with other States; but, for the existence of a comity of nations, it is unavoidable that such rights should be subject to more or less restriction. *Extraterritoriality* (*chigwai-hōken*) is the most important of such restrictions. Extraterritoriality does not mean that certain persons or objects within the territory of a foreign State are exempted by right from conforming to the law of that State; but that that State, by way of favour, or courtesy, excuses them from conforming to its law.

Persons and objects enjoying extraterritoriality are as follows:

1. States.—It is not for a State to be subject to the sovereignty of another and so it enjoys extraterritoriality at the hands of another State, with the result that if a State has property or does acts in another State, it enjoys the benefit of extraterritoriality in regard to such property or acts;
2. The same applies to sovereigns and their suites and luggage, Presidents being regarded in the same light as sovereigns in this respect;
3. Ambassadors and ministers, embassies and legations, and the staffs of embassies and legations;
4. Consuls.—Consuls are representatives of their country for economic purposes and not representatives of the same in political matters. So, they do not enjoy extraterritoriality. But now-a-days certain special privileges are in many cases conferred by treaty upon consuls and their families and attendants (as by Art. 3 of the—now expired—Germano-Japanese Treaty *re* the Duties [of Consuls])—privileges which are closely akin to extraterritoriality;
5. Men-of-war and troops.

Extraterritoriality is enjoyed as a matter of course without there being any special stipulation embodied in a treaty; but not so with *consular jurisdiction* (*ryōji saibanken*), which is

enjoyed only as a result of a special treaty. When subjects of "A" state residing in "B" state are not subject to the jurisdiction of the Courts of "B" state but to that of consuls sent out by "A" state to "B" state, "A" state is said to have consular jurisdiction in "B" state. Consular jurisdiction of foreign powers was recognized in Japan until 1899 when it was abolished by treaty. On the other hand, Japan and other States have still consular jurisdiction in China and Siam. In regard to China, Japan only has the right against China by virtue of Art. 3 of the Chino-Japanese Treaty of Commerce and Navigation concluded in 1896. Japan's consular jurisdiction in Siam is conditional, Japan having the right only until Siam shall have enforced a Civil Code (except as regards the law of marriage and law of succession), Code of Civil Procedure, Criminal Code, Code of Criminal Procedure and Law of Constitution of the Courts of Justice (*vide* the Memorandum made in Feb., 1897). For the contents of consular jurisdiction, *vide* *In re the Duties of Consuls* (Law No. 70 of the year 1899).

Mixed jurisdiction (kōgō-saiban) is where foreigners are admitted as judges in the law courts of a State so as to try and decide causes in conjunction with native judges. Arrangements for mixed jurisdiction are made, when the legal system of a country is not in a satisfactory condition and sufficient confidence cannot be placed in the impartiality of the court there. Egypt is now the only country where the system is adopted.

Extradition (hansainin-hikiwatashi) is where a State which has power to inflict punishment upon an offender who has fled into another country demands and obtains delivery of such offender from the latter country. Japan concluded a treaty of extradition with the United States in 1886 and another with Russia in 1911. The commercial treaty concluded with China in 1896 contains a stipulation on this head (Art. 24). Art. 6 of the Memorandum annexed to the treaty made with Spain in 1897 provides that the contracting Powers agree to make a special treaty in future in regard to mutual delivery of offenders, but

that until the conclusion of such treaty each of the contracting Powers shall, in that matter, and also in regard to the execution of claims in civil and criminal cases, grant to the other the same rights and privileges as have been, or will be, granted to the most favoured nation. So, Japan has rights and duties of extradition with Spain, too. The classes of offenders to be delivered are limited to those enumerated in the treaty (*vide* Art. 2 of the Americo-Japanese Treaty of Extradition).

In treaties of extradition, however, natives are often excepted (Art. 7, *ditto*), as also political offenders (Art. 4, *ditto*).

SECTION 4.

ORGANS OF REPRESENTATION OF A STATE.

Of organs of representation of a State, those which are continually resident in foreign countries are ministers and consuls, of whom the former represent the State in political acts and the latter, in economic acts.

Ministers (in a wider sense) include (1) ambassadôrs plenipotentiary, (2) ministers plenipotentiary, (3) ministers resident and (4) *chargés d'affaires*. When a State sends out a minister to another State, the latter is bound to receive him, but may refuse the particular person if there is good reason for so doing. It would be absurd to refuse any and every person. When a minister goes to reside in a foreign country, he takes with him credentials addressed by the sovereign (or, in the case of a *chargé d'affaires*, by the Foreign Minister) of his country to the sovereign (or, in the case of a *chargé d'affaires*, to the Foreign Minister) of the country in which he is going to reside and presents the same to the addressee on his arrival in the latter country.

As already pointed out, consuls are representatives of their home country for economic purposes. Though they do not differ from ministers in that they also reside in foreign countries

and attend to their duties there, their functions differ greatly from those of ministers. Apart from the fundamental difference that ministers are representatives for political purposes, while consuls are representatives for economic purposes, the number of ministers is limited, while that of consuls is not; for while there is, as a rule, only one minister for one country, it is usual to appoint several consuls in several parts of a foreign country, inasmuch as while political interests are uniform throughout the country, economic interests may vary from part to part of a country. Further, while a minister is sent out and received, not by virtue of a stipulation in treaty, the residence of consuls is always determined by treaty.

Consuls may be (1) appointed consuls, that is, consuls who are regular officials of the home country, (2) honorary consuls, that is, foreigners who are entrusted to exercise the functions of consuls, (3) common or ordinary consuls or (4) judicial consuls, that is, consuls who attend to judicial affairs (in the exercise of consular jurisdiction) as well as to affairs which come within the proper province of consuls.

Consuls are appointed by the home country and sent out to countries where they are to reside; but they do not begin to exercise their functions until the Governments of the countries in which they are to reside have granted them exequaturs (*nin-kajō*). A State to which a consul is sent out, as a rule, gives him an exequatur; but it may refuse to do so if the person in question has been guilty of an offence, or it is apprehended that his residence will be prejudicial to the peace and order of the country concerned. The duties of a consul consist in promoting his home country's economic interests in the country in which he is resident, seeing that the treaty of commerce and intercourse subsisting between his country and the country in which he is resident is operating in a satisfactory manner, and protecting people of his country living in the country in which he is resident.

SECTION 5.

TREATIES.

A treaty (*jōyaku*) is an agreement of intention between states as expressed in writing. The elements of which a treaty is composed are thus, (1) sovereignties, (2) representatives, (3) agreement and (4) ratification. As a treaty is formed by agreement, so it is terminated also by agreement; but there are cases where a treaty is terminated at the discretion of one of the contracting powers only; such being the case where, one of the contracting powers only having a right, such power makes a remission of the duty involved. A treaty may also be terminated independently of the intention of the contracting powers, such being the case where performance of the duty under treaty has become impossible either legally or as a matter of fact. This occurs most often when the parties to, or the subject-matter of, a treaty are or is extinguished, as when, a treaty of navigation having been made with reference to a certain river or sea, such river or sea has ceased to be navigable, or where, a treaty of alliance having been made among three powers, two of them have entered upon a state of war with each other, in which case the contractual duties of the third power are absolutely extinguished *ipso facto*. The commonest of treaties are commercial treaties. Though, in former days, most countries acted on the policy of national isolation and did not have free intercourse with foreign countries, there is now-a-days no country which absolutely shuts itself out of foreign intercourse, but all countries may freely trade and have intercourse with each other. Peaceful communication is the order of the day; the policy of national isolation is a dream of the past. Hence the development of commercial treaties. A commercial treaty usually provides (1) the freedom of residence and coming and going of people of the contracting powers, (2) the freedom of importing and exporting products and manufactures, (3) matters relating to customs duty, etc. There are two ways in which customs duty (*kwansei*)

is collected, that is, it may be collected either according to a statutory tariff (*Kokutei Zeiritsu*), that is, rates determined at the discretion of the given State, or according to a conventional tariff, (*Kyōtei Zeiritsu*), that is, rates determined by treaty with a specific State.

Customs duty is imposed either on the standard of value (*jūkazei*: ad-valorem duty) or of weight (*jūryōzei*: specific duty). With reference to ad-valorem duty, the value at what place and at what time is to be followed is determined by treaty. In this respect, the supplementary Anglo-Japanese Treaty provides that the ad-valorem duty to be imposed on imports according to the Tariff is to be determined by the cost price of the goods at the place of purchase, production or manufacture, plus the cost of insurance and freight from the place of purchase, production or manufacture to the port of destination, and commission (if any).

Most commercial treaties contain what is known as the most favoured nation clause (*saikeikoku jōkan*), that is, a clause by which each or one only of two contracting powers agree to grant to the other such rights and privileges as have been, or will be, granted to a third power.

Treaties are usually classified into (1) political treaties and (2) administrative treaties. Treaties of alliance, treaties of neutrality, etc. belong to the former class, while postal treaties, commercial treaties, servitude treaties, telegraphic treaties, treaties relative to copyrights, treaties for the protection of industrial property, etc. are of the latter class. For various treaties entered into by and between Japan and foreign powers, the reader is referred to a work entitled *Jōyaku Isan* ("Collection of Treaties and Conventions").

SECTION 6.

ADJUSTMENT OF DISPUTES BETWEEN STATES.

There are two ways in which a dispute arising between two States may be adjusted short of resorting to war, namely :—(1)

by the intervention of a third power and (2) between the contending powers themselves.

Intervention of a third power for the preservation of peace may assume various forms:

(1) *Acting as go-between (shūsen).*—This is for a third power to stand between the contending powers and communicate the intention of one to the other. In such a case, the third power acts merely as messenger and transmits the opinion and demands of the one to the other.

(2) *Intermediation (kyōchū-chōtei).*—In this case, a third power, instead of confining itself to communicating the opinion of one to the other, adopts measures so as to promote the peaceful solution of the dispute.

(3) *Arbitration (chūsai-saiban).*—Arbitration is where, two States disputing with each other on a question of law, a third power acts as judge and renders judgment for the solution of the question. According to the Convention for the Amicable settlement of International Disputes of 1907, a State may conclude with another what is called a treaty of arbitration in regard to a dispute which has arisen or may arise in future. This treaty includes a promise and undertaking faithfully to submit to an award. A permanent court of arbitration is established at the Hague in Holland. The procedure for arbitration trial, persons to be judges, manner in which a vacancy among them is to be filled—these and other matters are minutely provided in the said Convention for the Amicable Settlement of International Disputes.

(4) *International investigation (kokusai-shinsa).*—This is investigation which a third power is requested to make when there is a doubt or dispute between two powers on a question of fact. For this matter, too, the reader is referred to the Convention for the Amicable Settlement of International Disputes of 1907.

There are two kinds of methods by which a dispute is solved by the contending powers themselves, namely, (1) methods in which force is not used and (2) methods in which force

is used. The former include (1) successful refutation, (2) acknowledgment of the adversary's claim, (3) submission (yielding), (4) ultimatum, etc.; while the latter include (1) requital, which is where "A" state having violated the *interests* of "B" state, "B" state violates the interests of "A" state in the same way, (2) retaliation, which is where "A" state having violated the *rights* of "B" state, "B" state violates the rights of "A" state either in the same way or in a different way, (3) seizure of ships and (4) blockades in time of peace.

SECTION 7.

WAR.

War (*sensō*) is a general term for contests openly carried on by arms between subjects of (or parties to) acts in international law (and sometimes bodies or organizations which are recognized to be belligerents).

SUB-SECTION 1.

DIRECT EFFECT OF OUTBREAK OF WAR.

The direct effect of outbreak of war may be considered under three heads, namely, (1) the effect upon persons, (2) the effect upon things and (3) the effect upon legal relations. The effect upon persons includes the effect upon the hostile nation and the effect upon neutrals; but we will here confine ourselves to the discussion of the effect upon the hostile nation and that only with reference to that peaceful portion of them who are resident in the country with which their country is at war, leaving out of sight for the present the belligerent portion of the same. In ancient times, war used to be regarded as nullifying all relations between the belligerent powers; but the idea at present is that war terminates merely the peaceful relations between them and not all relations. So, ministers and consuls, who are organs of representation for purposes of peaceful intercourse between the powers, go home to their respective countries; but peaceful subjects of each belligerent power who are resident in

the country with which their country is at war need not necessarily do so. Unless there are special circumstances, or unless it is necessary for military purposes, neither belligerent power banishes out of its territory people of the country with which it is at war. Such was the attitude of Japan at the time of the Chino-Japanese War (Imperial Ordinance No. 137 of the year 1894) and also at the time of the Russo-Japanese War (Home Department Instruction No. 2 of the year 1904). The same was the attitude adopted by Japan towards the German residents in 1914. But should it be necessary for purposes of war, each belligerent power may of course banish people of the hostile country who are residing within its territory, or forbid others to enter its territory, or stop others, again, who are leaving the same.

Each belligerent power may confiscate goods of the hostile power which are found within its territory. Ships of the hostile country may also be confiscated, no matter whether they belong to the Government or to private individuals of that country. But as regards the enemy's ships which have been in ports or bays of one's country from before the outbreak of war, or which have entered the same without knowledge of the outbreak of war, it is a rule that they should be required to leave within a fixed time and should not be confiscated if they go in time (*Imperial Ordinance No. 20 of the year 1904*, and resolution of the International Peace Conference, 1907).

It was formerly believed that the treaties existing between two powers were all to be terminated *ipso facto* upon the outbreak of war between them. But such is not the case at present. Some of them are terminated, while others are not. To explain this more in detail.

1. Treaties which are terminated simultaneously with the outbreak of war.—These are the treaty or treaties which has or have been the cause of war and other treaties for political and military purposes;
2. Treaties the operation of which is suspended simultane-

ously with the outbreak of war.—Social treaties such as postal treaties and treaties of extradition come under this category;

3. Treaties which continue in force notwithstanding the outbreak of war.—Treaties which have been made for purposes of war, such as the Red Cross Convention, treaty *re* laws and customs of war, etc. are of this kind. Treaties which have been made during war, such as a treaty about truce, treaty for exchange, treaty of capitulation, are likewise valid. Of such treaties, however, some cease to be effective on the termination of war, while others continue in force even thereafter, a treaty for exchange of prisoners being of the former kind and a treaty of peace, etc. being of the latter kind.

As to commerce after the outbreak of war, and claims and rights of action between private individuals, there are two different principles, namely, English and Continental. According to the English principle, commerce between the belligerent nations is absolutely forbidden and transactions entered into subsequent to the outbreak of war are void, while transactions entered into prior to the outbreak of war are suspended in effect until the termination of war. The Continental principle is opposed to this.

SUB-SECTION 2.

BELLIGERENTS AND NON-BELLIGERENTS.

Those who are exposed to the violence of war are confined to belligerents (*kōsensha*). Non-belligerents (*hikōsensha*), that is, peaceful people, are free from the violence of war. Belligerents are classified into combatants and non-combatants. The following provision of Art. 1 of the Regulations Concerning Laws and Customs of War on Land dated 18th October, 1907 determine who are to be regarded as belligerents:

"The laws and rights and duties of war apply not only to troops but to corps of militia and volunteers fulfilling the following conditions, namely:

1. That they are headed by a responsible commander;
2. That they wear fixed special badges visible at a distance;
3. That they openly bear arms;
4. That they observe the laws and customs of war in their actions.

As an exception to the above, Art. 2 of the said Regulations provides :

"If the population of an unoccupied locality, who without having had time to organize themselves as under Art. 1 on the approach of the enemy take up arms, openly bear arms and observe the laws and customs of war, they shall be deemed to be belligerents."

SUB-SECTION 3.

PRISONERS.

Prisoners (*furyo*) are belligerents (as a rule) of either belligerent power who have actually come under the power of the troops of the adversary. Prisoners are prisoners of a State and not of private persons, generals, soldiers or military corps, so that the treatment of prisoners is a matter with which a State should concern itself. Persons are made prisoners, for the purpose of reducing the fighting strength of the enemy. Therefore the captor State must not ill-treat its prisoners, nor must it punish them without good reason. But if prisoners should take flight, it would be subversive of the object of curtailing the fighting strength of the enemy. So, the State may require prisoners to lay down arms and intern them at a fixed place (Regulations Concerning Laws and Customs of War on Land, Art. 5) : but nothing should be done to prisoners which will be prejudicial to their health. They may be employed in some suitable work in so far as it is not incompatible with their honour and health, and, it does not relate to the operations of war. In

such case, wages are to be paid to them and such wages are to be employed for the purpose of minimizing their suffering attendant on their situation, and, if there should be any balance remaining, it is to be delivered to them on liberation, after the costs of their maintenance have been deducted (*ditto*, Art. 6 and *Rules Concerning the Labour of Prisoners* of 10th September, 1904).

To maintain prisoners is the duty of the captor State, though a different arrangement may be made by treaty. The degree in which prisoners are to be fed and clothed is determined on the standard of maintenance accorded to the troops of the captor State (*Regulations Concerning Laws and Customs of War on Land*, Art. 7). Prisoners who have attempted to escape are liable to punishment; but even if prisoners who have successfully escaped are retaken, they are not liable to punishment for their previous escape (*ditto*, Art. 8).

Prisoners are set free either simply or on parole. Liberation on parole is where prisoners are set free on condition of their solemn promise under oath that they will take no further part in the war then raging. If prisoners have been set free on this condition, not only must they keep their promise but the country to which they belong must also refrain from requiring them to act contrary to their oath. Should the said country require them to break their promise, it is liable for a breach of international law, while prisoners who have broken their parole must be prepared for punishment when retaken. To set prisoners free is a right, not a duty, of the captor State. (*Ditto*, Arts 10, 11 and 12 and *Re the Punishment of Prisoners*, Law No. 38 of the year 1905.) Prisoners cease to be such not only by liberation but also by exchange, escape, death, peace, etc.

SUB-SECTION 4.

SPIES.

A spy (*k.mchō*) is a person who, with the object of informing either belligerent power, secretly moves within the zone of

military operations of the adversary, or collects, or tries to collect, information of various kinds under a fraudulent pretext (ditto, Art. 29). Spies are not entitled to the treatment of prisoners but are liable to punishment, because their proceedings are extremely dangerous to the State against which they act.

SUB-SECTION 5.

PARLEMENTAIRES.

A *parlementaire* (*gunshi*) is a person who carries a message from the forces of either belligerent power to the opponent forces. Intended as a *parlementaire* is to do peaceful acts, he is exempted from the violation of war. This is what is known as the "inviolability of *parlementaires*" (*gunshi no fukashinken*). As an outward expression of his being such, a *parlementaire* bears a white flag—an emblem of peace. The inviolability of a *parlementaire* is not confined to the messenger alone but the privilege is likewise enjoyed by the trumpeter, drummer, flag-bearer, interpreter, etc. who accompany him. But forces are not bound always to receive a *parlementaire* sent out by the opponent army; and when one is received, they may take precautionary measures sufficient to prevent him from obtaining knowledge of the position and other circumstances of the forces to which he is sent. If a *parlementaire* should abuse his privileges as such, the forces to which he is sent may detain him. If it is clearly proved that *parlementaires* has taken unlawful advantage of his privilege as such by doing tricky acts or instigating others to do such acts, he forfeits his right of inviolability. (Ditto, Arts. 32-34.)

SUB-SECTION, 6.

WOUNDED, SICK AND KILLED.

The wounded and sick possessing fighting strength no longer, it is unnecessary to subject them to further violence. The Geneva Convention of 1864, as amended in 1907, there-

fore, provides that no violence shall be done to the wounded and sick and people belonging to hospitals and those engaged in rescuing and relieving the wounded and also to hospitals. Persons and buildings who enjoy protection under this Convention are to be marked with the badge of a red cross on a white ground.

The Red Cross Convention had been applicable to war by land only until 1899, when by virtue of a new convention made at the Hague it was decided that the principles of the Geneva Convention of 1864 should be also applicable to naval warfare; and according to the latter convention as amended in 1907, (1) military hospital ships equipped by belligerent powers - that is, ships the sole object of which is to rescue and relieve the wounded, sick and shipwrecked, (2) hospital ships equipped wholly or partly at the expense of individuals or publicly recognized relief associations of a belligerent power and (3) military hospital ships equipped wholly or partly at the expense of individuals or publicly recognized associations of a neutral power, are free from the violence of war. For full details of the matter, *vide* the Convention referred to.

No insult is to be inflicted upon the dead; but measures should be taken, so far as possible, to ascertain their identity. They must be buried, different degrees of care being accorded to persons of different ranks. The property of the dead too is to be sent back to their home country. (*Regulations Concerning Laws and Customs of War on Land, Art. 19 and Rules Concerning the Cleaning of Fields of Battle and Burial of the Dead [War Department Notice No. 100 of the year 1904].*)

SUB-SECTION 7.

PROPERTY OF THE ENEMY.

Property of the enemy may be found on land or at sea; but here we will confine ourselves to the enemy's property on land. In view of their owners, the properties of the enemy may be classified into (1) those owned by the government of the enemy, (2) those owned by the public and (3) those owned

by private individuals: while, in view of their substance, they may be classified into (1) properties for military purposes, (2) those for peaceful purposes and (3) those which are used for military purposes as well as for peaceful purposes. Properties which belong to the hostile State—and which are used for military purposes—may be destroyed, if immovables; or confiscated, if movables. With properties which are never employed for military purposes but are intended for peaceful purposes, all that can be done is to use and take the profits of them. Properties owned by the public, such as churches, temples, schools, orphanages, libraries and properties therein, are all properties which are not employed for military purposes, so that they can be neither destroyed nor confiscated, unless they are at the same time used for military purposes. Private property is always inviolable. This is clearly provided in Art. 46, par. 2 of the said Regulations, which ordains that private property cannot be confiscated.

SUB-SECTION 8.

OCCUPATION.

Occupation (*senryō*) denotes a state in which, in consequence of the invasion of troops of a belligerent power into a locality of the opponent country, the sovereignty of the latter country is actually prevented from operating in such locality. According to Art. 42 of the Regulations Concerning Laws and Customs of War on Land, if a locality is actually and physically in the power of the enemy's forces, it is regarded as occupied: occupation is confined to the limits within which such power is established and enforced. The sovereignty of the locality occupied continues to vest in the country occupied; the occupying country merely causing the army of occupation to *exercise* the sovereignty of their country over the occupied locality in order to meet the necessities of war. So, unless otherwise provided when concluding peace, the locality occupied is, as a matter of course, restored to the sovereignty of the occupied*

country, both in name and in fact, simultaneously with the restoration of peace. The occupying forces should respect, so far as possible, the laws, judgments and administration of the country occupied ; but should it be found necessary for military purposes, they may suspend the said laws and publish and enforce laws of their own. The occupying forces must not violate the rights of the inhabitants of the place occupied, nor may they (the inhabitants) be required to swear allegiance to the country to which the occupying forces belong. The occupying forces must also respect the honour and rights of the family, the life and property of individuals, and their religious convictions and exercises. (Ditto, Arts. 43-46.)

As regards the property in the locality occupied, what has been said in Sub section 7 governs. Properties in the locality occupied are, as a rule, inviolable, but they are subject to requisitions and contributions. Requisitions mean that the commander of the army of occupation requires the inhabitants or bodies (organizations) of the locality occupied, to supply them with goods such as are necessary for military purposes or for their maintenance and support (as quarters, provisions, wagons and horses) or with labour (as when a number of men are required for the construction of a bridge, etc.,). In both cases, demand can be made only by orders of the commanding officer and also to such extent as is necessary for the purpose of occupation ; and, moreover, a price and wages must be paid for the goods and labour furnished. In requisitioning goods, also, it is necessary to use care so that only such goods are requisitioned as are suitable for the particular place. If it should be found impossible to pay a price for goods, receipts for them should be delivered instead and cash payment made afterwards. Contributions are also subject to the same restrictions ; and, in collecting monies, the standard and rules for the imposition of taxes then in force should be followed so far as possible, and receipts delivered to those who have paid. (Ditto, Arts. 48-52.)

SUB-SECTION 9.

SIEGE, BOMBARDMENT AND CAPITULATION.

It is only when it is necessary for military purposes that an unprotected place may be invested (ditto, Art. 25). It is a lawful and legitimate act to attack or bombard a protected place, and such act may extend to things as well as to persons within the besieged place. Except in case of assault, however, it is required to give previous notice of the intended investment, in order to enable non-belligerents; and property which has nothing to do with war, to remove or to be removed to a safe place (ditto, Art. 26).

As regards buildings which are devoted to religion, charity, education, art, science, etc., care should be taken to attach some particular sign visible from the distance so as to cause them and the property therein to be spared by the attacking forces. For this purpose, however, it goes without saying that it is necessary that the buildings should not be used at the same time for military purposes (ditto, Art. 27). Owing to necessities of war, diplomatic officials of third powers resident within the besieged locality cannot always be allowed to communicate with their home governments without any restraint whatsoever. Though the exchange of letters and telegrams should not be obstructed to a greater extent than is unavoidable, yet when the duties of belligerents clash with the necessities of war, it is proper that the former should give way to the latter.

Agreement of capitulation binds the parties immediately concerned and their home countries. Even when one of the parties has entered into it for an unjustifiable reason, the agreement does not become null and void on that account. But an agreement of capitulation in which either of the contracting parties has acted in excess of his powers, as, for example, when it is agreed to cede a territory or to cause forts which are not under his authority to capitulate also, does not bind the home country.

SUB-SECTION 10.

MEASURES INIMICAL TO THE ENEMY.

The object of war consists in reducing the fighting strength of the enemy in order to make him relinquish his claims ; and so it is contrary to international law to do acts other than those calculated to reduce the fighting strength of the enemy. Art. 22 of the Regulations Concerning Laws and Customs of War on Land provides that the belligerent do not possess an unlimited choice of means of injuring the enemy, while Art. 23 of the same contains the following provisions :

" Besides the prohibitions provided by special conventions, it is specially interdicted :

- (a) To use poison or poisonous weapons ;
- (b) To kill or wound by treacherous acts individuals belonging to the hostile State or forces ;
- (c) To kill or wound an enemy who, having laid down arms or having no further means to defend himself, has surrendered himself ;
- (d) To declare not to give quarter ;
- (e) To use arms or projectiles or substances calculated to cause superfluous (unnecessary) suffering ;
- (f) To abuse a flag of truce, the national flag or the military insignias or uniform of the enemy, and also the signs distinctive of the Geneva Convention ;
- (g) To destroy or seize the enemy's properties where such destruction or seizure is not absolutely necessary for purposes of war ;
- (h) To declare the extinction, suspension or judicial inadmissibility of rights or rights of action of individuals belonging to the hostile power.

The final resolutions of the International Conference at the Hague in 1899 contain among other things the following stipulations :—

1. That the contracting powers agree to the interdiction

- for a term of five years of the throwing of projectiles or explosives from balloons or by other similar new methods;
2. That each contracting power abstain from the use of missiles exclusively intended to diffuse asphyxiating gases or poisonous gases;
 3. That the contracting powers abstain from the use of bullets which expand or flatten easily in the human body such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

SUB-SECTION II.

REGULATIONS *re* MARITIME WAR.

In regard to warfare on land, private property is inviolable; but not so in regard to warfare on sea. So, ships of the hostile nation are all liable to confiscation. The same applies to cargo of the hostile nation, with the exception of that which is on board neutral ships and which is not available for military purposes. Ships of the hostile nation which enjoy immunity are confined to coast fishing-boats, vessels engaged in scientific discovery, charity or religion, cartel ships and ships carrying *parlementaires*. There is some doubt as to whether lighthouse ships come also under the same category.

For the establishment of a valid blockade (*fūkō*) of a port or bay, it is necessary:

- (1) That it be effected by order of the commanding officer;
- (2) That the approach to the port or bay be actually barred: Item 4 of the Declaration of Paris of 1856 provides that in order that a blockade may be valid and obligatory, it is necessary that it should be effective, that is, it must be maintained by a force sufficient to really prevent access to the shores of the enemy (*in reference vide Art. 21 of the Japanese Naval Prize Regulations and also the Declaration of London of 1909*);

(3) That notification be given; notification may be either general or particular; but in Japan it is regarded as a breach of blockade, should any person who has received, or is to be considered as having received, notification have attempted to enter or leave the blockaded port;

(4) That it be continuously maintained by a fleet.

(1) Vessels which have got, or attempted to get, out of the blockaded locality and (2) vessels which have transshipped, or have attempted to tranship, cargo from ships which have broken the blockade outwards, are both regarded as having broken the blockade outwards; while (1) vessels which have entered, or attempted to enter, the blockaded locality by passing the line of blockade and (2) vessels which are in the vicinity of the blockaded locality and which are to be regarded as clearly destined for a place within the blockaded locality, whatever may be the statements in their ship papers and (3) ships which are outside the blockaded locality and which have carried, or attempted to carry, their cargo into the blockaded locality by transshipping the same into other ships and causing the latter to pass the line of blockade, are all regarded as having broken the blockade inwards.

Ships which have broken blockade, and cargo therein, are liable to confiscation.

"Contraband of war" (*senji kinseihin*) is of two kinds, namely, (1) absolute contraband of war and (2) conditional contraband of war. Absolute contraband of war consists of articles which can be used only in war and which are destined for the enemy's country or for the enemy's military and naval forces; while conditional contraband of war consists of articles which can be used for peaceful as well as for warlike purposes and which are destined for the enemy's military and naval forces, or in regard to which, in view of the condition of their place of destination, it is clearly apparent that they are intended to be made use of by the enemy's military and naval forces. As to

what are such articles, the matter is determined at the discretion of each country.

Contraband is always liable to confiscation. As regards the penalty upon ships carrying contraband of war, this does not admit of a sweeping generalization. Vessels, however, are always liable to confiscation, (1) if both they and the contraband cargo therein belong to one and the same owner, and (2) if the owners or masters (captains) thereof have knowledge of the fact of contraband of war being loaded therein. As to the carrying of what amount of contraband of war renders the ships (carrying the same) liable to confiscation, this is not generally fixed; but it is generally recognized by most Powers that in case a ship carries a very considerable amount of contraband, not only the cargo but the ship herself should be confiscated (*vide Declaration of London of 1909*).

"Contraband persons" (*senji-kinseijin*) are military men and others belonging to the hostile power who are transported for the purpose of being employed in the military operations of their native country; while "contraband documents" (*senji-kinseisho*) include all kinds of public documents dispatched to and from officials of the hostile government in the performance of their public functions. The penalty in regard to contraband persons is to make prisoners of them, while the penalty in regard to contraband documents is confiscation.

Each belligerent power has a right to detain, inspect, and/or capture ships, whether hostile or neutral, ships captured being referred to the examination of the Prize Court. For the constitution of, and the procedure for examination in, the Japanese Prize Court, the reader is referred to the *Ordinance Concerning the Prize Court* (promulgated by Imperial Ordinance No. 149 of the year 1894 and amended in 1904 and 1905).

SUB-SECTION 12.

NEUTRALITY.

When a State does not give any aid, either positively or nega-

tively, to either of other States warring with each other, such State is said to be neutral (*chūritsu*). It is a rule for a State which does not take part in a war between other States to make a declaration of neutrality; but, whether she declares herself neutral or otherwise, a State is neutral if she has nothing to do with a war between other States.

When the forces of a belligerent power enter upon the territory of a neutral power, it is the latter's duty to cause them to lay down their arms, and to detain them at a place as far distant as possible from the seat of war. Otherwise, she would be giving support to one of the belligerent powers. Though a neutral power is bound to furnish the forces thus detained with food, clothing and shelter, the country to which they belong must pay such power compensation for the costs on the termination of the war. So far as the wounded and the sick are concerned, however, a neutral power may permit them to pass through her territory, even though they belong to a belligerent power.

When men-of-war and other ships for military purposes of a belligerent power are in a port or bay of a neutral power, it is incumbent on the latter to cause them to leave within twenty-four hours, though more or less time may be given them, if it be necessary for taking in food and coals.

In case a man-of-war or an ordinary ship of either belligerent power is in a port of a neutral power simultaneously with a man-of-war of the other belligerent power, the latter must not be allowed to leave until twenty-four hours have elapsed after the former's departure, because otherwise one may pursue and fight or capture the other.

SUB-SECTION 13.

TRUCE.

"Truce" (*kyūsen*) is an agreement between belligerents for the temporary cessation of hostilities. A truce may extend to the whole or only a portion of the forces of the belligerents. On

the conclusion of a truce, all warlike acts are to be suspended. As to whether the dispatch of reinforcements and the transport of provisions are to be included in warlike acts, there is some room for doubt, so that, in making an agreement of truce, it is necessary that minute stipulations should be entered into on these points, as, for example, Art. 3 of the Chino-Japanese Convention of Truce of 1895. A truce meaning nothing more than the temporary cessation of hostilities, each belligerent is at liberty to maintain the results of hostilities so far. Thus, blockades are to be maintained and occupation continued.

The forces of belligerent powers camping face to face with each other even during a truce, they may come into collision if measures are not taken to prevent it. A zone of separation or neutral zone is an arrangement which is made with that object in view. Breaches of truce are of two kinds, namely (1) breaches by the forces of either State without the command of that State and (2) breaches by either State herself. In the former case, the State to which the guilty forces belong is liable to pay compensation for damage resultant from the breaches; but the other party to the truce cannot break the truce at once; but in the latter case either party to the truce may at once rescind it on the ground of the other's having broken the same.

SUB-SECTION 14.

TERMINATION OF WAR.

War is terminated either by treaty or otherwise than by treaty. War is terminated otherwise than by treaty :—

- (1) When one State has conquered the other, as Britain has the Transvaal.—In such a case the conquered State loses its existence and with it the war with that State is terminated *ipso facto*.
- (2) When war has been abandoned as a matter of fact.—Though this may appear like a mere temporary cessation of hostilities, peaceful relations must be regard-

ed as having been restored between the States concerned, if they send ministers to each other or enter into commercial and other peaceful treaties.

The fact that war is terminated by a treaty of peace requires no explanation. As to the special effects of treaties of peace, these are to be considered in regard to various kinds of such treaties.

CHAPTER XI.

INTERNATIONAL PRIVATE LAW.

SECTION I.

MEANING OF INTERNATIONAL PRIVATE LAW

International private law (*kokusai shihō*) is useful in determining by the law of which country certain relations under private law are to be governed—for example, the law of which country, Japan or the United States, is to be applied to a marriage effected in the United States between a Japanese subject and an American citizen, or according to which law, Japanese, British or American, it is that the formation and effect, etc. are to be determined of a contract of sale which has been made in England between a Japanese subject and an American citizen, or according to the law of which country the obligatory relation is to be determined when a German and Frenchman in Italy have entered into a contract for a loan of money.

In Europe, there are writers who contend that international private law is really municipal law; but such municipal law as partakes of the nature of international private law must be distinguished from international private law itself; inasmuch as principles of international private law, like those of international public law, are binding upon the nations. As yet, however, there are not many principles which are recognized under inter-

national private law ; but there are tendencies that the law will be more and more developed as time goes, and that nations will ultimately come to acknowledge and abide by it.

SECTION 2.

CAPACITY.

As above explained, international private law does not, like international public law, determine the relations between States but the relations between private persons. As to the question by the law of which country the capacity of persons is governed, there are two principles. According to one (which is championed by Continental writers), it is to be governed by the law of the home country of each person : in the case, for example, of a Japanese subject resident in France, the question of whether he is a minor or not is to be determined by Japanese law ; while according to the other (which is advocated by English and American jurists), the matter is to be decided according to the law of the place of the given person's domicile ; if, for example, a married woman who is a Japanese subject is domiciled in England along with her husband, the question of her capacity is to be determined, not by Japanese law—the law of her home country—but by English law (in reference *vide Law Concerning the Application of Laws in General*, Art. 3)

SECTION 3.

RELATIONSHIPS.

SUB-SECTION 1.

MARRIAGE AND DIVORCE.

Marriage is the most important of all human acts, inasmuch as it is the basis on which a lawful family is organized and forms the fountain from which all family rights arise. And it is all the more important to fix by the law of which country various (international) questions relating to marriage are to be

governed, because there is no human relation in regard to which the laws of different countries are more at variance. The matter is to be considered under two heads, namely, (1) material conditions and (2) formal conditions.

In regard to material conditions (capacity for marriage), (1) some hold that they are to be determined according to the law of the home country of each party, (2) others that they are to be determined according to the law of the place of his or her domicile and (3) others, again, that they are to be determined according to the law of the place of the act. In most countries, however, the first mentioned view is followed. Thus, in regard to the material conditions of marriage, the law of the home country of each party is, as a rule, to be followed; but if his or her home country is unknown, or the home country has no law in this respect, the law of the place of his or her domicile is to be followed; and if the place of his or her domicile is unknown, or he or she has no domicile, then the law of the place of his or her residence is applicable. The theoretical reason why the capacity for marriage is determined according to the law of each party's home country is that provisions relating to capacity (of action) owe their origin to the intention of protecting the parties concerned, and the capacity of a person being developed earlier or later according to the local conditions, manners and customs, etc. of his or her own country, the law of no country can be more suitable for the protection of the party than that of his or her home country (*ditto*, Art. 13).

As regards the formal conditions of marriage, most countries agree in ruling that they are to be governed by the law of the place of the act (that is, the place of the celebration of the given marriage), because questions of form have no intimate connection with the law of the home country of the parties, but they have a great deal to do with the law of the place of the act, and it is, moreover, convenient for the parties to conform to the same (*ditto*, same Article).

As regards the legal effect of marriage, it is generally held

that it should be determined according to the law of the husband's home country, because such arrangement is best suited for the maintenance of order in the family. Thus, the rights and duties between husband and wife are determined exclusively according to the law of the husband's home country (*ditto*, Arts. 14 and 15).

As for divorce, Japanese law (*ditto*, Art. 16) provides that divorce is governed by the law of the home country of the husband at the time of the occurrence of the fact forming its cause. Thus, in case a Japanese husband and wife have been naturalized to China after the husband's commission of robbery, the wife has a right to demand divorce according to the law of the husband's home country at the time of the occurrence of the fact forming its cause, that is, Japanese law, even though, according to Chinese law, robbery committed by the husband does not constitute a ground for legal divorce.

SUB-SECTION 2.

PARENT AND CHILD.

Whether a child is legitimate or not is determined according to the law of the home country of the father at the time of the birth of the child. This applies, among other things, to a parent's right of contest. Questions arising in connection with an illegitimate child are solved by acknowledging such child and so determining the rights and duties between the child and parent. Now the conditions for acknowledgment are determined severally in regard to the different parties. Thus, capacity to acknowledge is governed by the law of the home country of the acknowledging party, while capacity to be acknowledged is determined according to the law of the home country of the child (*ditto*, Arts. 17 and 18).

In respect to adoption, the conditions for being an adoptive parent and the conditions for being an adopted child are severally determined according to the home country of each party;

while the effect of an adoption—that is, the legal relations between adoptive parent and adopted child, after an adoption has been formed—are governed by the law of the home country of the adoptive parent; this applying not only to status rights but to property rights also (*ditto*, Art. 19).

SUB-SECTION 3.

DUTY OF SUPPORT.

Questions arising in connection with the duty of support between parent and child, and between other relatives, are determined according to the law of the home country of the party against whom support is claimed (*ditto*, Art. 21), because the latter is the party most affected by such claim.

SECTION 4.

REAL RIGHTS.

As regards the question of by which law of which country real rights should be governed, there are various theories. Some hold that both movables and immovables should be governed by the law of the place of their location, others that both movables and unmovables should be governed by the law of the home country of the owner or by the law of the place of his domicile, and others, again, that immovables should be governed by the law of the place of their location, while movables are to be governed by the law of the home country of the owner or by the law of the place of his domicile. But there are now few persons who object to the contention that immovables should be governed by the law of the place where they are located (*lex rei sitae*), because they are intimately connected with the order and welfare of the country in which they are located. Movables are perpetually changing their location, so that it is not proper that they should be governed by the same rule as immovables, and therefore many persons who insist that they should be governed by the law of the owner's home country,

or by the law of the place of his domicile. The Japanese law (*ditto*, Art. 10) provides :—

" Real rights relating to movables and immovables, and other rights which require to be registered, are governed by the law of the place where their subject-matter exists.

As regards the acquisition or loss of rights mentioned in the preceding Paragraph, it is governed by the law of the place where the subject-matter exists at the time when the fact forming the cause of the said acquisition or loss is completed."

It is according to these rules, therefore, that questions relating to ownership, possessory rights, rights of usufruct, servitudes, etc. and also to material security are to be determined.

SECTION 5.

OBLIGATIONS.

Law relating to contracts being based on the fundamental consideration that the intention of individuals should be respected to the greatest possible extent, individuals may agree to follow the law of any country, so long as it is not prejudicial to the public order or good morals of the country concerned. So even when a person enters into a contract in a foreign country, there is nothing to prevent him from stipulating by the law of what country such contract shall be governed, except on the matter of capacity. In deciding on the question of the formation and effect of a contract, therefore, the intention of the parties is to be consulted in the first instance, and the matter decided according to the law of that country by whose law they intended to be bound, if their intention is clearly apparent. But how is the question to be settled if the parties have not clearly expressed their intention and it cannot be ascertained from other circumstances? There are various answers to this question such as (1) that it is to be decided by the law of the home country

of the creditor, because, in regard to a contract, more importance is to be attached to the creditor, (2) that it is to be decided by the law of the home country of the debtor, because more consideration is to be paid to the debtor, (3) that it should be decided by the law of the place of performance, because it is for the sake of performance that a contract is entered into, (4) that it should be decided by the law of the place of a suit brought in connection with it, because nothing is of greater importance to the case than the place of the suit and (5) that it should be determined by the law of the place of the act. The last seems to be the soundest of all, because the law with which the parties are best acquainted is that of the place where the act has been done, and nothing is more intimately connected with the parties than the place of the act. In fact, this is the view accepted by most people. So, the effect of a contract is governed by the law of the place of the act, in so far as it is not contrary to the peace and order of the country concerned. As to the form of a contract, it is always to be governed by the law of the place of the act, in pursuance of the principle that the form of an act is governed by the law of the place. (Ditto, Arts. 7 and 8.)

In regard to an expression of intention made to a person residing in a place governed by a different law, Art. 9 of the *Law Concerning the Application of Laws in General* provides:—

“As regards an expression of intention made to a person residing in a place governed by a different law, the place from which notice of the same is dispatched is regarded as the place of the act.

As regards the formation and effect of a contract, the place from which the notice of the offer is dispatched is regarded as the place of the act. In case the recipient of the offer is ignorant, at the time of his acceptance, of the place from which the offer was dispatched, the place of the offerer's domicile is regarded as the place of the act.”

Claims arising from “business management,” unjust enrich-

ment or unlawful acts (*torts*) are governed by the law of the place of the occurrence of the facts forming the cause of such claims, for the same reason as that for which contracts in general are governed by the law of the place of the acts (*ditto*, Art. 11).

SECTION 6.

SUCCESSION.

As regards the law by which a succession is to be governed, there are some scholars who contend that it should be governed by the law of the place of the property of the succession; but the majority of jurists are of the opinion that it should be governed by the law of the home country of the ancestor. Japanese law also acts on this principle and leaves all questions relating to succession to be decided by the law of the home country of the ancestor (*ditto*, Art. 25), not only because it may sometimes be contrary to the intention of the ancestor not to follow the law of his home country, but also because matters concerning succession affect the public order of the home country of the ancestor.

SECTION 7.

COMMERCIAL MATTERS.

SUB-SECTION 1.

BILLS.

If, as regards the capacity for acts upon a bill, too, the general principle of capacity for action being governed by the law of the home country of the particular party was to be applied, a person doing a transaction upon a bill would be put to the inconvenience of having to ascertain the home country of the other party and whether he is duly capacitated to act according to the law of that country, and this would tend to greatly reduce the value of bills which are intended to circulate smoothly and promptly. So, in a certain country, in regard to

the capacity for acts on a bill, an exception is recognized to the general rule above referred to and it is provided that even when a person has no capacity for acts upon a bill according to the law of his home country, he is to be regarded as capacitated, if he has such capacity according to the law of the place of the act. This is what is provided in Art. 84 of the German Law of Bills. Art. 125 of the *Law Concerning the Application of the Japanese Commercial Code* also contains a provision to the same effect. In England and America, the capacity for acts on a bill is governed by the law of the place of the act, so that a person is capacitated if he is so according to the place of the act, even though he is not according to the law of his home country. These countries do not, however, act *absolutely* on the principle that the capacity for acts on a bill is to be governed by the law of the place of the act, for, though a person who is capacitated according to the law of the place of the act is regarded as capacitated, without any regard to the provisions of the law of his home country, a person who is capacitated according to the law of his home country but incapacitated according to the law of the place of the act is likewise regarded as capacitated, in spite of the provisions of the law of the place of the act. In France, however, the principle is acted on according to which the law of the home country of the party always and absolutely governs.

The form of a bill is governed by the law of the place of the act. This is but another application of the general principle that the form of an act is governed by the law of the place of the act. Art. 126 of the *Law Concerning the Application of the Commercial Code*, too, follows the same principle. The proviso to Art. 72 of the English Bills of Exchange Act lays down that even a bill issued in a foreign country is valid if it "conforms, as regards requisites in form, to the law of the United Kingdom." But the principle generally accepted now is that the matter should be governed by the law of the place of the act.

Performance of an obligation under a bill—that is, payment

of a bill—, is, like performance of an ordinary obligation, governed by the law of the place of performance, because it is practically impossible to make payment otherwise than in accordance with the law of the place of performance.

The effect of a bill is, as a rule, governed by the law of the place of the act : but there is an eclectic view which recognizes a certain exception to the rule—a view which was adopted by a resolution of the International Commercial Law Conference of 1885, running to the effect that the effect and validity of a bill of exchange or promissory note, and also the effect and validity of indorsement, acceptance or suretyship, are to be governed by the law of the country where such act has been done in so far as the provisions relating to the capacity of the signatory are not thereby contravened ; provided, however, that the effect of an act subsequent to the drawing or making of a bill must not exceed the effect provided by the law of the place of drawing or making of such bill.

SUB-SECTION 2.

COMMERCE BY SEA.

As to matters relating to ships, it is held by some that they are to be governed by the law of the place where they happen to be, and by others that they are to be governed by the law of the place where the suit is pending. But neither of these principles is satisfactory, such being especially the case with the first view, inasmuch as it has the drawback that, according to that view, the law by which a ship is governed must vary with the place where she is. The theory which removes this difficulty, and which is generally accepted now, is that matters relating to a ship, for example, the powers of a shipmaster, should be governed by the law of her home country (*lex patriæ*), that is, the country of her nationality and registry.

As regards a contract of carriage, no question under international law can arise if the place of the contract and the place

of destination of the ship are governed by the same law. It is only when the place of destination is governed by a law differing from that of the place of the contract that we meet with international complications. In such a case, the general rule is that the law of the place of the contract governs. In regard to the effect of such a contract, however, certain exceptions to this rule are recognized. Thus, if performance is to be made at the place of destination, the law of the place of performance—that is, the law of the place of destination—governs. Defences against a claim owing to damage to cargo are also governed by the law of the place of performance, if such claim has been made subsequent to the delivery of the cargo.

As to average, there are various doctrines such as (1) that it should be governed by the law of the place of destination of the ship, (2) that it should be governed by the law of the place of the suit, (3) that it should be governed by the law of the place of departure of the ship, (4) that it should be governed by the law of the home country of the ship and (5) that it should be governed by the law of the place of discharge of the cargo. Of these, however, the generally accepted theory now is that it should be governed by the law of the place of destination of the ship—a view which was also accepted by the International Commercial Law Conference of 1887.

SUB-SECTION 3.

COMPANIES.

A company is a juridical person—that is, it is created by virtue of law and is recognized as a person by a legal fiction, so that, unlike a natural person, its personality is not necessarily recognized in all countries. Each country is, thus, at liberty to decide whether to recognize the personality of foreign juridical persons or not. No country is absolutely bound to recognize juridical persons constituted in a foreign country. But the progress of civilization resulting in the increasingly extended application of economic principles to practice, and the growing

combination of labour and capital, juridical persons—more especially, commercial companies—have been formed in large numbers, while, on the other hand, intercourse and communication both among nations and among individuals have become more frequent and intimate; so it has come to pass that companies of one country enjoy advantages, thanks to their recognition in another country, and there are not a few cases where one nation is benefited by the companies of another nation. To recognize foreign companies as juridical persons is, therefore, not only advantageous to one's own country, but such course is also advisable in view of that friendly relation in which each nation stands to another and which makes it only right and proper for them both to consult their mutual convenience. In most countries, therefore, foreign companies are recognized either by law or by treaty. The various principles followed by different countries on this head may be roughly classified as follows, namely, (1) that recognition should be accorded unconditionally, (2) that companies of certain countries only should be recognized, (3) that foreign juridical persons should be recognized in certain cases only, and (4) that certain classes of juridical persons only should be recognized, while others are not. The nationality of a company is, as a rule, determined by the place of its head office.

The provisions governing native companies are also applicable to foreign companies when their operations are detrimental to public order or good morals. Art. 260 of the Japanese *Commercial Code* provides:

"When a representative of a foreign company which has set up a branch office in Japan commits as to the affairs of such company an act contrary to public welfare or to good morals, the Court may, upon application of a Public Procurator or its own motion, order such branch office to be closed."

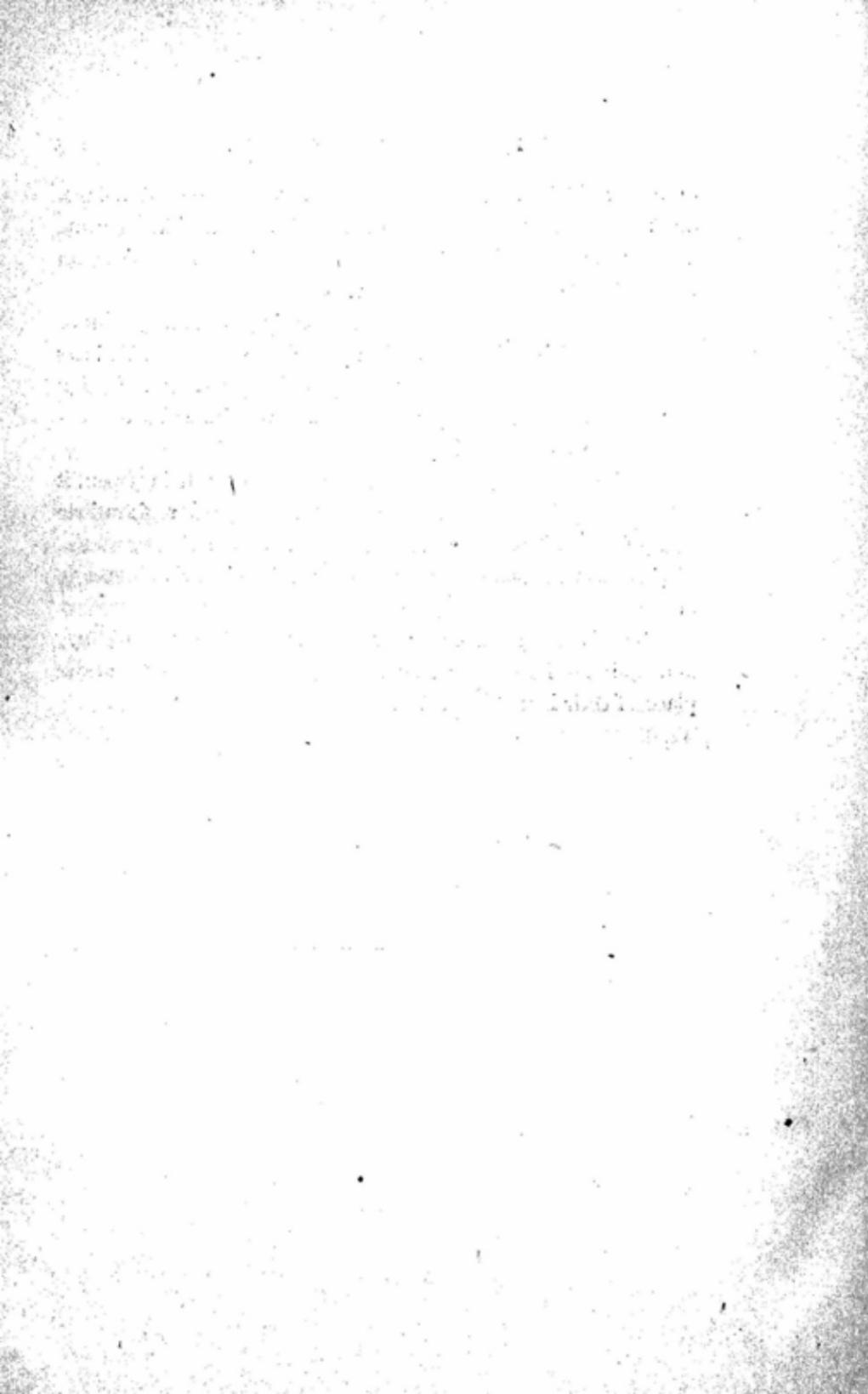
A foreign company which has the same object, or is to carry on the same business, as a native company which is re-

quired to obtain a special license or to submit to special control must obtain a special license or submit to control in the same manner as such native company. This is clearly provided in Art. 258 of the *Commercial Code* :—

“A company which sets up its principal office in Japan or which makes it its principal object to carry on business in Japan, must, even though it is formed in a foreign country, comply with the same provisions as a company formed in Japan.”

When a foreign company sets up a branch in Japan, it must, at the place of such branch, make the same registrations and public notifications as companies of the same kind or of the kind most resembling it in Japan (*Commercial Code*, Arts. 255 and 257).

The issue of shares or debentures by a foreign company, and the transfer of the same, are governed by the law of the place of their issue (ditto, Art. 259).



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